From: GOV Press
To: GOV Press
Subject: Governor Scott Walker Seeks Applicants for District II Court of Appeals Judge
Date: Tuesday, May 26, 2015 5:09:57 PM

SCOTT WALKER
OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE
May 26, 2015
Contact: Laurel Patrick, (608) 267-7303

Governor Scott Walker Seeks Applicants for District II Court of Appeals Judge

Madison – Governor Scott Walker announced today he is seeking judicial applicants for appointment to the District II Court of Appeals.

The new appointee will replace outgoing District Judge Richard S. Brown, whose resignation is effective August 1, 2015. The new appointee, should he or she choose to run, would be up for election in April 2017.

To apply, please submit the following:

- **Cover Letter**
- **Resume (not exceeding two pages)**
- **References (list of 3-4)**
- **Two Writing Samples**
- **Judicial Application**: found on Governor Walker's website: www.walker.wi.gov.
(Select the Judicial Application button, after clicking "Apply to Serve" at the right-hand side of the page)

Complete application materials should be submitted via email to the following:
govjudicialappointments@wisconsin.gov

All application materials for this judicial appointment must be received no later than **5:00 p.m., Friday, June 5, 2015**. Following submission, you will receive an email confirming that we have received your application, and describing the general process for the appointment.

Potential applicants with questions about the process should email their questions to govjudicialappointments@wisconsin.gov. If you need to speak with someone immediately, you may

contact Brian Hagedorn at 608-266-1212.

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From: Brian Hagedorn
To: GOV Judicial Appointments
Subject: District II Court of Appeals Judicial Application
Date: Monday, June 15, 2015 4:13:50 PM
Attachments: ApplicationAttachment.pdf
Cover Letter June 2015.pdf
References June 2015.pdf
Resume June 2015.pdf
Signature Page.pdf
Writing Sample 1.pdf
Writing Sample 2.pdf
Judicial Appointment Application.pdf

Please find my application materials attached:

Cover Letter
Resume
References
Writing Sample 1
Writing Sample 2
Completed Judicial Application
Application Attachment
Signature Page

To the extent possible under law, I request that my application remain confidential. Thank you very much.

Brian Hagedorn

Brian K. Hagedorn

■ 11 Prentice Place, Madison, WI 53704 ■ [redacted] ■ [redacted]

June 15, 2015

Governor Scott Walker
115 East State Capitol
Madison, WI 53702

Dear Governor Walker:

One of the great honors of my life has been serving as your top advisor on judicial appointments. Many hours have been spent seeking and promoting those that share your judicial values, those that will leave a legacy for years to come.

After much prayer and wisdom-seeking from those I trust, I am applying to step into this role myself on the District II Court of Appeals. A court of appeals judge must be devoted to legal writing, thinking, and scholarship. He must be humble, understanding his limited, yet meaningful role. He must be someone who will dignify the bench through his conduct and collegiality. Maybe most significantly, he must be deeply rooted in the rule of law and the first principles underlying the judicial task.

As you review my academic credentials and my experience in the private sector, the judicial branch, and the executive branch, I trust you will find that I am equal to this calling. My career has exposed me to the incredible diversity of the law—criminal law, administrative law, business litigation, eminent domain, personal injury, open records, and constitutional litigation of the highest order. Indeed, few attorneys have ever faced the complex public law legal issues that have crossed my desk in recent years. It is no stretch to say that I have played a leading role in some of the most significant appellate litigation this state has ever seen. More than this, I have endeavored to be a leader in the law, helping to shape law students, attorneys, and the judiciary through speaking, mentoring, promoting the values I so strongly believe in.

I grew up in southeastern Wisconsin, and my family still resides there. I went to grade school and middle school in Waukesha County, and lived in District II prior to coming to Madison to serve the state five years ago. It would be a great privilege to move back and serve the people of our great state in a new role. Thank you for your consideration.

Sincerely,

Brian K. Hagedorn

Brian K. Hagedorn

■ 11 Prentice Place, Madison, WI 53704 ■ [redacted] ■ [redacted]

EXPERIENCE

Chief Legal Counsel 2011-Present
Office of Governor Scott Walker, Madison, WI

- Member of Governor's executive management team overseeing administration staff, policy, communications, and strategic direction.
- Manage Office of Legal Counsel, including attorney and non-attorney staff, projects, initiatives, intern program, and stakeholder relationships.
- Direct the appointment process for prosecutors and judges.
- Design, communicate, and enforce administration ethics policies.
- Manage litigation involving the Governor or legal priorities in federal and state court, including the Wisconsin Supreme Court, Seventh Circuit Court of Appeals, and the United States Supreme Court.
- Work with legislature, stakeholders, and policy team to draft and pass legal reforms.
- Serve on Wisconsin Claims Board hearing appeals for reimbursement from the State for, among other things, wrongful convictions.
- Serve on State Bar Bench-Bar Committee, which seeks to promote the Rule of Law and relationships between attorneys and judges.

Assistant Attorney General 2010-2011
Wisconsin Department of Justice, Madison, WI

- Represented state agencies and employees in civil litigation in state and federal court.
- Engaged in written and oral advocacy before courts and mediators.

Law Clerk, Wisconsin Supreme Court 2009-2010
Justice Michael J. Gableman, Madison, WI

- Assisted in drafting Supreme Court opinions in criminal, civil, and constitutional law cases.
- Provided legal advice and analysis on pending cases and draft opinions.

Litigation Associate Summer 2005; 2006-2009
Foley & Lardner LLP, Milwaukee, WI

- Represented small and large companies in all aspects of complex commercial litigation.
- Managed written discovery and document production, including drafting and responding to written discovery requests, and gathering, producing, and analyzing documents.
- Took and defended depositions of parties and non-parties, including witness preparation.
- Drafted substantial legal documents at all stages of litigation, including a summary judgment motion and federal appellate briefs, as well as pleadings, discovery requests, procedural/discovery motions, subpoenas, and pre-trial memoranda.
- Argued various motions in court, highlighted by a habeas appeal before the Seventh Circuit Court of Appeals.

Blackstone Fellowship Intern Summer 2004
Alliance Defense Fund, Phoenix, AZ
Americans United for Life, Chicago, IL

- Received three weeks of training from legal experts and judges on the foundations of law and cultural engagement as a fellow with the Alliance Defense Fund.
- Supported various research and writing projects as Intern for Americans United for Life.

Participant Services Associate, Processing Analyst 2000-2003
Hewitt Associates, Lincolnshire, IL

- Managed the daily administration of 401(k) retirement programs.
- Served as evaluator and trainer for team members on qualified plan fundamentals and customer service standards.

EDUCATION

Northwestern University School of Law, Chicago, IL
Juris Doctor May 2006

- GPA: 3.5/4.0
- President, Federalist Society
- Member, Christian Legal Society

Trinity International University, Deerfield, IL
Bachelor of Arts in Philosophy, minor in Biblical Studies May 2000

- GPA: 3.9/4.0, *summa cum laude*, with Honors
- Teacher's Assistant for Philosophy and Biblical Studies Departments
- Student Senator and Student Senate Chaplain
- Intercollegiate Football & Baseball

NOTEWORTHY ACTIVITIES, HONORS, AND SPEECHES

Honors

- 2014, Trinity College Alumnus of the Year

Selected Speeches

- 2015, Speeches at Marquette and University of Wisconsin Law School, "Judicial Appointments and Judicial Philosophy"
- 2015, Presentation to Administration Chief Legal Counsels, "Building a Rule of Law Administration"
- 2014, Speech to Milwaukee Chapter of the Society of Corporate Secretaries and Governance Professionals
- 2014, Speech to Federalist Society, Madison Lawyers Chapter, "Act 10: A Postmortem"
- 2012, Speeches at Marquette and University of Wisconsin Law School, "The Walker Administration: A Legal Retrospective"
- 2012, Speech at Trinity College, "Lessons in Leadership"
- 2011, Lecture series on the Wisconsin legal system, legislation, and the rule of law to local government leaders in Shanghai, China.

Selected Volunteer Activities

- 2010-Present, Federalist Society, Madison Lawyers Steering Committee
- 2010-Present, The Vine Church, Madison, WI: Sunday School Teacher, Small Group Leader, Host Pastor
- 2005-2010, CrossWay Community Church, Kenosha, WI: Small Group Leader, Leadership Training Class, Chair of Mercy Ministries Team
- Fall 2000, Cook County Jail: Volunteer Chaplain
- Summer 1999, International Teams Missionary in Tenancingo, Mexico

Brian K. Hagedorn

■ 11 Prentice Place, Madison, WI 53704 ■ [redacted] ■ [redacted]

REFERENCES

The Honorable Michael J. Gableman
Justice of the Wisconsin Supreme Court
Relationship: Former Employer
Office Phone: (608) [redacted]
Can speak to my legal skill, writing abilities, work ethic, and personal qualities

Attorney Joseph L. Olson
Partner, Michael Best & Friedrich LLP
Relationship: Outside counsel on Act 10 litigation
Office Phone: (414) 277-3465
E-mail: jlolson@michaelbest.com
Can speak to my legal abilities and personal qualities

Attorney Daniel R. Suhr
Chief of Staff, Lt. Governor Rebecca Kleefisch
Relationship: Former colleague in Office of Legal Counsel
Office Phone: (608) 266-3516
E-mail: [redacted]
Can speak to my legal abilities, commitment to the rule of law, and personal qualities

SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

115 EAST STATE CAPITOL
MADISON, WI

APPLICATION FOR JUDGESHIP

Instructions

Thank you for expressing an interest in serving Wisconsin. To apply for a judgeship, please submit the following: 1) a completed application, 2) a resume not exceeding two pages in length, 3) a cover letter, 4) a list of three to four references with contact information, and 5) two writing samples.

When filling out this application please use additional pages as necessary to provide full and complete answers to every question.

Letters of recommendation are encouraged, and may be sent via email to govjudicialappointments@wisconsin.gov, or via mail to Office of Governor Scott Walker, Attn: Chief Legal Counsel, 115 East State Capitol, Madison, WI 53702. Recommendation letters will be accepted and considered after the application deadline has passed. Please note SCR 66.06(5), which provides that an applicant "shall not knowingly personally solicit or accept endorsements from parties who have a case pending before the court to which election or appointment is sought." You may wish to also review the provisions of SCR Chapter 60 that apply to someone seeking a judgeship appointment.

To apply, please email your materials with the county or circuit you are applying for in the subject line to govjudicialappointments@wisconsin.gov. Please note that the last page must be printed, signed, scanned, and attached to the application. If you are unable to scan, you may fax the last page to the number below. All application materials (the application, cover letter, resume, reference list, and writing samples) must be attached to the email, preferably as PDFs. All components of the application must be received by 5:00 P.M. CST on the date applications are due.

Following submission of your application, you will receive an email confirming receipt of your application and explaining the next steps in the process. If you have any questions, you may email govjudicialappointments@wisconsin.gov. If you need to speak with someone immediately, please call (608) 266-1212 and ask to speak with Brian Hagedorn.

Upon request, this document can be made available in alternate formats to individuals with disabilities.

APPLICATION FOR APPOINTMENT TO THE COURT
(Please attach additional pages as needed to fully respond to questions)

DATE: June 15, 2015 **WISCONSIN BAR NO.:** 1061490

I. GENERAL:

1. Name: Brian Hagedorn Email: [redacted]
2. Date admitted to practice law in Wisconsin: 10/3/2006
3. Date admitted to practice law in other states: n/a
4. Current employer and title: Chief Legal Counsel, Office of Governor Scott Walker
5. Work address: 115 East State Capitol

   City:Madison County: Dane State: WI ZIP: 53702

   Telephone: 608-266-1212
6. Residential Address: 11 Prentice Place

   City: Madison County: Dane State: WI ZIP: 53704

   Length of time at this residence:5 years

   Home telephone: n/a

   Cell phone: [redacted]
7. List all previous residences for the past ten years

   9511 67th Street, Kenosha, WI 53142

   5223 11th Avenue, Kenosha, WI 53140

8. Place of birth: Elmbrook Hospital, Brookfield, WI

   Date of birth: [redacted]/1978 Age: 37
9. Are you a registered voter at your current address? Yes ☒ No ☐
10. Wisconsin driver's license number: [redacted]

11. Marital status: Married

If married: Spouse's name: [redacted]

Date of marriage: [redacted]

Spouse's occupation: [redacted]

If ever divorced, please provide all former spouses' names and current addresses, the dates and places of divorce, and the court and case numbers for the divorces.

12. List any children (including stepchildren).

Name	*Age*	*Occupation*	*Residential address*
[redacted]			

13. Answer yes or no to the following questions. Attach a separate page explaining any affirmative answers.

a) Yes ☐ No ☒ Do you currently have a physical or mental impairment that in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?

b) Yes ☐ No ☒ In the past ten years, have you unlawfully used controlled substances as defined by federal or state laws? Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs that were prescribed to you and taken under lawful supervision of a licensed health care professional.

c) Yes ☐ No ☒ Since leaving high school, have you, for other than academic reasons, ever been denied enrollment, disciplined, denied course credit, suspended, expelled, or requested to terminate your enrollment by any college, university, law school, or other educational institution?

d) Yes ☐ No ☒ Have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any contractual arrangement?

e) Yes ☐ No ☒ Have you ever been held in contempt or otherwise formally reprimanded or sanctioned by a tribunal before which you have appeared?

f) Yes ☐ No ☒ Are you delinquent in your mandatory continuing legal education?

g) Yes ☐ No ☒ Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If yes, please supply the jurisdiction and/or county, case number, nature of lawsuit, whether you were the plaintiff or defendant, and disposition of each lawsuit.

h) Yes ☐ No ☒ Has there ever been a formal complaint filed against you, a finding of probable cause, citation, or conviction issued against you, or are you presently under investigation by the Wisconsin Judicial Commission, the Supreme Court of Wisconsin, the Office of Lawyer Regulation, or any other state or federal equivalent, or any court, administrative agency, bar association, or other professional group, in any jurisdiction?

i) Yes ☐ No ☒ If you are a quasi-judicial officer, have you ever been disciplined or reprimanded by a sitting judge?

j) Yes ☒ No ☐ In the past five years, have you ever been cited for a municipal or traffic violation, excluding parking tickets?

k) Yes ☐ No ☒ Have you ever failed to timely file your federal or state income tax returns?

l) Yes ☐ No ☒ Have you ever paid a tax penalty?

m) Yes ☐ No ☒ Has a tax lien ever been filed against you?

n) Yes ☐ No ☒ Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

o) Yes ☐ No ☒ Have you ever owned more than ten percent of the issued and outstanding shares, or acted as an officer or director, of any corporation by which or against which a petition in bankruptcy has been filed?

II. EDUCATION:

14. List secondary schools, colleges, law schools, and any other professional schools attended.

School	*Dates Attended*	*Degree(s) Earned and GPA*
Wauwatosa West High School, Wauwatosa, WI	1992-1996	Diploma (I do not recall my GPA)
Trinity College, Deerfield, IL	1996-2000	B.A. in Philosophy; GPA: 3.9/4.0, summa cum laude, with Honors
Northwestern University School of Law, Chicago, IL	2003-2006	J.D.; GPA: 3.5/4.0

List and describe academic scholarships, awards, honor societies, and extracurricular involvement. Note any leadership positions.

I was involved in numerous activities in high school. Though I cannot recall them all, the highlights include the following: high school football, basketball, and baseball; National Honor Society; Model United Nations; and two all-day business management simulation events.

At Trinity College, I played intercollegiage football for one year and baseball for three years, receiving a modest scholarship for both. I believe I received a modest academic scholarship as well, though I cannot recall for sure. In any event, I was a member of the Honors Program, and was one of only three (as best I recall) members of my graduating class to graduate summa cum laude. I also served in student government, and spent significant hours grading and tutoring as a Teacher's Assistant for the Philosophy and Biblical Studies Departments. During my final semester, I had the privilege of serving as an intern for then U.S. Senator Peter Fitzgerald in his Chicago office. Also, through Trinity, and in partnership with a non-profit organization, I spent one of my summers in Tenancingo, Mexico assisting a local church.

At Northwestern, I participated in many of the special speaker events hosted by campus organizations. I also was a member of the Christian Legal Society and the Federalist Society. During my final year, I was the President of the Federalist Society. As part of my presidency, I drafted a conference proprosal that led to Northwestern's hosting of the annual Student Federalist Society Conference the year following my graduation.

III. MILITARY EXPERIENCE:

15. List all military service (including Reserves and National Guard).

Service	*Branch*	*Highest Rank*	*Dates*

Rank at time of discharge: Type of discharge:

List any awards or honors earned during your service. Also list any citations or charges pursued against you under the Uniform Code of Military Justice.

IV. PROFESSIONAL ADMISSIONS:

16. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and, if applicable, state whether you have ever been suspended or have resigned.

Court or Administrative Body	*Date of Admission*
Eastern District of Wisconsin	approx. October 2006
Seventh Circuit Court of Appeals	approx. October 2006
Wisconsin State Bar	October 2006

V. NON-LEGAL EMPLOYMENT:

17. List all previous full-time non-legal jobs or positions held in the past eight years.

Date	*Position*	*Employer*	*Address*

VI. LEGAL EMPLOYMENT:
(If you are a sitting judge, answer questions 18–23 with reference to before you became a judge.)

18. State the names, dates, and addresses of all legal employment, including law school and volunteer work.

Date	*Position*	*Employer*	*Address*
2011-Present	Chief Legal Counsel	Office of Governor Scott Walker	115 East State Capitol, Madison, WI
2010-2011	Assistant Attorney General	Wisconsin Department of Justice	17 West Main Street, Madison, WI
2009-2010	Law Clerk	Wisconsin Supreme Court	16 East State Capitol, Madison, WI
Summer 2005; 2006-2009	Attorney	Foley & Lardner	777 East Wisconsin Avenue, Milwaukee, WI

19. Describe your legal experience as an advocate in criminal litigation, civil litigation, and administrative proceedings.

My career has involved three very different legal roles: litigator, adjudicator, and in-house general counsel. All three have given me experience in a broad diversity of issues, cases, and areas of law.

I was a general commercial litigator at Foley & Lardner, representing both smaller companies and Fortune 500 companies in all aspects of complex commercial litigation in state courts, federal courts, and arbitration proceedings around the country. My work included breach-of-contract claims, a non-compete lawsuit, asbestos litigation, and product liability. Responsibilities included managing all aspects of discovery, including drafting and responding to written discovery requests, and gathering, producing, and analyzing responsive documents. I also took and defended a number of depositions of parties and non-parties. I drafted substantial

legal documents at all states of litigation, including pleadings, procedural/discovery motions, subpoenas, summary judgment briefs, and pre-trial memoranda. Attendant to this, I argued various motions in court, highlighted by a criminal habeas appeal before the Seventh Circuit Court of Appeals.

At the Department of Justice, I representated the state in federal and state court in all manner of civil cases, including medical malpractice, eminent domain, personal injury, habeas corpus, probation revocation, workers compensation, and First Amendment litigation.

My experience isn't complete without noting my time as a law clerk on the Wisconsin Supreme Court. While there, I assisted Justice Gableman and the Court in well over 100 cases dealing with insurance disputes, criminal procedure, administrative law, and significant constitutional cases, to name a few.

Finally, in my current role, I serve as essentially the in-house general counsel for the Walker administration. Thus, though I have not been the attorney of record, I have played a significant role in overseeing quite possibly the most significant flurry of legislation-related litigation this state has ever seen. My role included overseeing the hiring and management of outside counsel, reviewing briefs, leading strategic discussions, participating in mock arguments, and sitting at the counsel table in federal and state courts. As such, I have been a key player in many cases in state and federal courts, from the trial level to the appellate level, including multiple cases before the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals. Sample litigation includes nine separate cases challenging Act 10 in Wisconsin and federal courts (we won them all); four different cases challenging the Voter ID law in Wisconsin and federal courts (we won them all); a bankruptcy/Eleventh Amendment case in federal court (pending); a challenge to a law we signed reforming administrative rules (pending); and the recent constitutional challenge to the state's new right to work law (pending). In addition, I have played a key role in multistate cases Wisconsin has participated in as a party and as amicus in courts around the country, including many in the United States Supreme Court. I have been the Governor's counselor and the key strategic and legal contact in the Governor's Office for the Attorney General on our participation in these cases. Sample cases include multistate medicaid fraud, amicus work in U.S. Supreme Court criminal procedure cases, and significant constitutional cases like the challenges to the Affordable Care Act and the President's recent immigration orders.

20. What percentage of your legal career has been in:

Court		Area of Practice	
Federal appellate:	20%	Civil:	90%
Federal trial:	10%	Criminal:	5%
Federal other:	2%	Family:	0%
State appellate:	25%	Probate:	0%

State trial:	35%	Other:	5%
State administrative:	5%		
State other:	3%		
TOTAL	100 %		100 %

21. In your career, how many cases have you tried that resulted in a verdict or judgment?

Jury: - Non-jury: approx. 10

Arbitration: 1 Administrative bodies: -

22. How many cases have you litigated on appeal? Please provide case names and case numbers. If you have litigated less than twenty cases, please describe the nature of each case, your involvement, and each case's disposition.

Including my work as chief legal counsel in the Office of the Governor, I have been involved in some capacity in dozens of appellate cases, though my level of involvement has varied. It is worth noting as well that I participated in well over one hundred additional appeals as a law clerk at the Wisconsin Supreme Court.

As the attorney of record, I briefed and argued Jones v. Wallace, 525 F.3d 500 (7th Cir. 2008) as pro bono counsel appointed by the court. This case was a petition for habeas corpus on the grounds that trial counsel was constitutionally defective. The Seventh Circuit affirmed the District Court's refusal to grant a hearing on the effectiveness of counsel.

I also was attorney of record appointed by Governor Walker in Appling v. Walker, 2014 WI 96 (Wis. 2014). This was a challenge to the state's domestic partner registry under the marriage amendment to the Wisconsin Constitution. I did not offer substantive briefs or argument in this case. The Wisconsin Supreme Court held that the domestic partnership law did not violate the state's marriage amendment.

In my current position, as noted above, I am involved in most major litigation involving the State of Wisconsin. Notable cases include the following:

--Act 10 Litigation: I oversaw the hiring and management outside counsel, and in partnership with the Department of Justice, helped lead the State's defense in all 9 cases challenging Act 10. These cases led to two decision in the Seventh Circuit--WEAC v. Walker, 705 F.3d 640 (7th Cir. 2013) and Laborers Local 236 v. Walker, 749 F.3d 628 (7th Cir. 2014), and two decisions in the Wisconsin Supreme Court--State ex rel. Ozanne v. Fitzgerald, 798 N.W.2d 436 (Wis. 2011) and MTI v. Walker, 851 N.W.2d 337 (Wis. 2014). These cases covered issues in employment law, the Fourteenth Amendment, the First Amendment, and core structural questions related to the

separation of powers. I was deeply involved in strategy, editing briefs, and argument preparation.

--Voter ID: I worked with the Department of Justice throughout two state court cases and two federal cases. The federal cases culminated in an opinion upholding the Voter ID law--Frank v. Walker, Lulac v. Deininger, 768 F.3d 744 (7th Cir. 2014). The same result was reached by the Wisconsin Supreme Court in the two state cases--League of Women Voters v. Walker, 851 N.W.2d 302 (Wis. 2014) and NAACP v. Walker, 851 N.W.2d 262 (Wis. 2014).

--Administrative Rules: I have worked very closely with the Department of Justice in crafting our legal arguments in defense of the Governor's power to approve administrative rules promulgated by the Superintendent of Public Instruction. We have a petition for review pending in the Wisconsin Supreme Court following a decision by the court of appeals holding that the Superintendent has constitutional authority to promulgate rules without the Governor's approval (Coyne v. Walker, 2015 WI App 21 (Wis. App. 2015).

--Same-sex marriage: I worked with the Department of Justice to prepare the defense of Wisconsin marriage laws. The Seventh Circuit ultimately held that the Fourteenth Amendment to the United States Constitution prohibited Wisconsin from continuing to limit marriage to unions between one man and one woman. Baskin v. Bogan, Wolf v. Walker, 766 F.3d 648 (7th Cir. 2014).

--The Governor's appointment powers: I worked with the Department of Justice in defense of the Governor's appointment powers vis-à-vis federal bankruptcy law. The Seventh Circuit issued a partial decision in Chasensky v. Walker, 740 F.3d 1088 (7th Cir. 2014) holding that the Governor enjoyed qualified immunity from the plaintiff's privacy and equal protection claims.

Significant multistate appeals I have worked on include our current challenge to the President's immigration laws (Texas v. United States, Fifth Circuit Case no. 15-40238) and the challenge to the Affordable Care Act (NFIB v. Sebelius, 132 S.Ct. 2566 (2012)). Indeed, it is fair to say I have been involved in most major multistate efforts around the country in some capacity, whether in cutting edge criminal law cases to ground-breaking cases dealing with core issues of federalism and religious freedom.

23. List and describe the two most significant cases in which you were involved; give the case number and citation to reported decisions, if any. Describe the nature of your participation in the case and the reason you believe it to be significant.

1) State ex rel. Ozanne v. Fitzgerald, 798 N.W.2d 436 (Wis. 2011)

I began assisting in the drafting of Act 10 not long after the Governor was inaugurated. We knew litigation would come, and come it did. But we did not expect the first legal fight to be over whether the legislature has the power to carry out its legislative role without judicial interference. Contrary to popular understanding, State ex rel. Ozanne was not about open

government or even the merits of Act 10. It was about core separation of powers principles. Namely, does the Wisconsin Constitution permit a circuit court judge to tell the legislature how to follow the legislature's internal rules, and can a circuit court judge prevent a duly enacted bill from becoming law (separate distinct from the power to enjoin an unconstitutional law)? The case in circuit court was fraught with procedural irregularities; we felt our only recourse was to have the state bring an original action against the circuit court judge and the district attorney. The Wisconsin Supreme Court ultimately took the case and agreed with us that the circuit court had violated the separation of powers.

This case was important for several reasons. First, there have been few more consequential pieces of legislation in Wisconsin history. The public policy impact of this victory is hard to understate. Second, the separation of powers embodied in our Constitution is core to our freedom and to our republican form of government. The Wisconsin Constitution simply does not give the judiciary authority to act as it did. The Supreme Court recognized and remedied this, explaining that they granted the petition for original action "because one of the courts that we are charged with supervising has usurped the legislative power which the Wiconsin Constitution grants exclusively to the legislature." Id. at para. 7. Finally, this case is significant because the Court stepped into a complicated political situation to uphold the rule of law. Courts need to have the intellectual and moral courage to refrain, but also the intellectual and moral courage to step in--all of this in furtherance of their limited, but meaningful Constitutional role.

2) MTI v. Walker, 851 N.W.2d 337 (Wis. 2014)

Following the procedural challenge to Act 10 in State ex. rel. Ozanne, a flurry of suits were filed challenging the substance. They followed two basic theories. One set of cases challenged the law on equal protection grounds, quibbling with legislative line drawing on general employees versus public safety employees, and arguing that prohibiting units of government from collecting union dues via payroll deduction violated the First Amendment. The Seventh Circuit Court of Appeals rejected these theories and upheld Act 10 in its entirety in WEAC v. Walker, 705 F.3d 640 (7th Cir. 2013). The second set of cases argued that the provisions of Act 10 collectively imposed a burdensome and unconstitutional condition upon membership in a union in violation of the unions' First Amendment speech and association rights. One case was decided in the federal courts, with both Judge Conley and the Seventh Circuit rejecting this theory (Laborers Local 236 v. Walker, 749 F.3d 628 (7th Cir. 2013)). A separate case brought in state court came to the same outcome (WLEA v. Walker, Case No. 12CV4474). The third case making the same claims, but this time finding some early success, was MTI v. Walker.

The Dane County Circuit Court struck down several provisions of Act 10 under this unconstitutional conditions theory. The case also raised significant issues regarding the Wisconsin Constitution's home rule provisions. There were many wrinkles in the case procedurally as well. We fought vigorously over a stay of the lower court ruling, and had significant disagreements over the reach of the circuit court decision. We argued that the order was a declaration applicable only to the parties; the plaintiffs argued it was the legal equivalent of a Supreme Court decision. While the case had already been accepted by the Wisconsin Supreme Court, the circuit court entertained and granted a motion for contempt against the WERC Commissioners for enforcing Act 10 against non-parties. The Supreme Court ultimately

used its superintending authority to vacate the contempt order. On the merits, the Supreme Court again upheld Act 10 in its entirety.

The public confusion, procedural wrangling, and political import of every move in this case made it at once thrilling and dismaying. It was incredibly frustrating to have legal theories handily and correctly rejected in nearly identical cases nonetheless create incredible uncertainty and protracted litigation in this case for three years. But this case represents an even more incredible triumph. Act 10 was a significant and complex piece of legislation challenged at every level with nearly unlimited resources by those who were unable to defeat it at the ballot box. Every legal challenge failed in its entirety, as each should have under the law. At the end of the day, apart from the underlying policy merits, the rule of law won.

VII. PRIOR JUDICIAL EXPERIENCE:

24. Have you ever held judicial or quasi-judicial office? If so, state the court(s) involved and the dates of service.

Dates	*Name of Agency/Court*	*Position Held*

A. List the names, phone numbers, and addresses of two attorneys who appeared before you on matters of substance.

B. Describe the approximate number and nature of cases you have heard during your judicial or quasi-judicial tenure.

C. Describe the two most significant cases you have heard as a judicial officer. Identify the parties, describe the cases, and explain why you believe them to be significant. Provide the trial dates and names of attorneys involved, if possible.

VIII. PREVIOUS PARTISAN OR NON-PARTISAN POLITICAL INVOLVEMENT:

25. Please list all instances in which you ran for elective office. For each instance, list the date of the election (include both primary and general election), the office that you sought, and the outcome of the election. Include your percentage of the vote.

26. Have you ever held a position or played a role in a judicial, non-partisan, or partisan political campaign, committee, or organization? If so, please describe your involvement.

I was a member and later board member of the Kenosha County Republican Party from 2005-2009. In addition to various party-building activities, I assisted in various local races. In 2008, I was the county co-chair for the McCain campaign. Since taking on my role at the Governor's Office, I have, on my own time, given informal assistance and guidance to several judicial candidates.

27. Please list all judicial or non-partisan candidates that you have publically endorsed in the last six years.

I do not recall all of the candidates who I have endorsed, but they include Justice David Prosser and (now Chief) Justice Patience Roggensack. I likely also gave my endorsement to several judicial appointees I met through the appointment process, but I do not know which, if any, would have listed me as having given a public endorsement.

IX. HONORS, PUBLICATIONS, AND PROFESSIONAL AND OTHER ACTIVITIES:

28. List any published books or articles, giving citations and dates.

I published a summary of 2007 cases applying Section 17 of the 1933 Securities Act for the Securities Industry Association annual survey.

I published occasional articles/op-eds in the Kenosha News related to public policy issues during my time in Kenosha. I do not have a list or final copies of those articles or dates, but most would have been in the 2005-2009 timeframe. I also published an op-ed in a local magazine supporting the Wisconsin marriage amendment in December 2005.

29. List any honors, prizes, or awards you have received, giving dates.

In May 2014, I was named Trinity College alumnus of the year. I was honored at the graduation ceremony and gave brief remarks. I understand that I am the youngest award winner in the College's history. The award was given in recognition of "Outstanding Vocational Accomplishments, Community Leadership and Endeavors, and Meritorious Service and Commitment to Christ."

30. List all bar associations and professional societies of which you are a member; give the titles and dates of any office that you may have held in such groups and committees to which you belong or have belonged.

Outside of my mandatory membership in the Wisconsin State Bar, I have been a member of the Eastern District Bar Association from roughly 2006-2014. I have also been a member of the State Bar Bench-Bar Committee since 2013. Our committee selects the circuit judge of the year, and the lifetime achievement award, among other things.

In addition, I have long been a member of the Federalist Society, attending the national lawyers convention in Washington, D.C., attending local events, and helping to start the local lawyers chapter in Madison.

31. Describe any additional involvement in professional or civic organizations, volunteer activities, service in a church or synagogue, or any other activities or hobbies that could be relevant or helpful to consideration of your application.

I have always been involved in my local church, often in a leadership role. At my current house of worship, The Vine Church in Madison, I have taught Sunday School, served on the cleaning team, led a small group, and served as a host pastor facilitating weekly worship. My church also serves regularly at the Elizabeth House, a residential maternity and parenting program for moms-to-be. I've engaged in similar service at my prior houses of worship.

32. Describe any significant pro bono legal work you have performed in the last five years.

33. Describe any courses on law that you have taught or lectures you have given at bar association conferences, law school forums, or continuing legal education programs.

For ease, I will combine the answers to question 33 and 34 here:

2015

--Speeches at Marquette and UW Law School on "Judicial Appointments and Judicial Philosophy"
--Presentation to administration Chief Legal Counsels on "Building a Rule of Law Administration"
--Speech at a conference of top legal leaders at the state level on "Top Tips for Succeeding as Chief Counsel to a Governor"
--Presentation to the Milwaukee Bar Association on the court system budget

2014

--Led a Federalist Society panel discussion called, "Act 10: A Postmortem," discussing the lessons and legal significance of the Act 10 cases.
--Speech to the Milwaukee Chapter of the Society of Corporate Secretaries and Governance Professionals on the rule of law
--Presentation to administration Chief Legal Counsels on "Building Relationships"
--Speech at the NGA management seminar for Governor's Legal Counsels on "Governor's Legal Counsel: Role as Senior Staff Member"
--Panel participant at a conference for law students on discerning career opportunities and balancing priorities

2013

--Speech at the NGA management seminar for Governor's Legal Counsels on "Building Key Working Relationships"
--Litigation briefing to members of the Wisconsin Counties Association on status of Act 10 litigation
--Seminar presentation for law students on "The Conservative Legal Movement: Debates, Challenges, and Opportunities"

2012

--Speeches at Marquette and UW Law School on "The Walker Administration: A Legal Retrospective"
--Speech at college alma mater as part of their Lessons in Leadership series
--Speech at local Federalist Society lawyers chapter kickoff event, giving an overview of the Federalist Society, including its origin and principles

2011

--Multi-day lecture series on the Wisconsin court system, Wisconsin ethics laws, legislation, and the rule of law to local government leaders in Shanghai, China
--Speech at my alma mater on foundational principles for engaging in politics

Outside of these professional speeches and lectures, I have provided numerous trainings and lectures to internal staff in the course of my job duties. I have also spoken at investitures, occasional political events, and to numerous school groups visiting the Capitol. In addition, I am a regular speaker/teacher in the course of my volunteer duties through my church.

34. Describe any other speeches or lectures you have given.

see question 33

X. FINANCIAL INVOLVEMENT:

35. If you or your spouse are now an officer, director, or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and you or your spouse's intended involvement upon your appointment or election to judicial office.

36. Describe any business or profession other than the practice of law that you have been engaged in since being admitted to the Bar.

37. Describe any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind that you have received during the past five years.

I have received two modest honoraria for speeches unrelated to my professional duties.

XI. ADDITIONAL INFORMATION:

38. Explain in one page or less why you want to become a judge/justice.

Broadly conceived, I believe engagement in public life through the law is my vocational calling. Central to that for me is a devotion to the rule of law, our written Constitution, and the separation of powers. A significant portion my time in the Governor's Office has been devoted to precisely these values, through litigation, management of executive branch duties, and overseeing the judicial appointment process. Promoting judges who believe in the rule of law, and have the intellectual and moral courage to live out this commitment, has been a driving passion for me. Joining the ranks of these public servants, then, is a natural extention of this vocational calling.

The appellate bench is an opportunity to serve people by upholding the rule of law. It is an opportunity to influence how law is done in our courts through excellent legal scholarship. It is an opportunity to do basic justice by ensuring, consistent with the law, that contracts are enforced, criminals are held accountable, and constitutional rights are respected. I am not pursuing this to achieve a title or career capstone. My commitment to promoting the public good through the judicial role is what drives me.

After many conversations with colleagues and mentors, I believe this role is a proper fit not only to my calling, but to my gifts as well. I love reading and writing and thinking about the law. I have, I believe, the temperment and mindset of a jurist. And I look forward to the kind of collaborative and collegial decision-making performed by an appellate panel. In short, this position seems to accord with my vocational mission, my skill set, and my interests. Few are so fortunate to have this alignment in their career path.

39. In one page or less, name one of the best United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

Coulee Catholic Schools v. LIRC, 768 N.W.2d 868 (Wis. 2009)

This case, which I had the privilege of working on while clerking at the Supreme Court, concerned whether Wisconsin non-discrimination laws could apply to the termination of a teacher at a Catholic school. The Court rightly determined that both the U.S. and Wisconsin Constitutions precluded an age discrimination claim, and it did so using a legal approach I would seek to emulate.

First, the Court understood its proper role. It is not clear who would win a popular vote today in a conflict between a discrimination claim and religious freedom. But the Court's job was not to decide what was more valuable or important to society, or to balance the values. Rather, the Court's job was to determine whether the federal or state constitutions protected the religious school's power to decide how to govern itself. If it did, the Constitution is always supreme over statutory restrictions. The Court conducted precisely this kind of analysis. It noted that religious freedom was foundational, "not because religious freedom is broadly understood to be a basic human right, but because our nation's founders recognized and enshrined this right in our nation's Constitution," with Wisconsin following suit "to include specific and more extensive protections for religious liberty in our state constitution." Id. at para. 33.

A second notable and noble virtue of this opinion is its root in the text, particularly in its analysis of the Wisconsin Constitution. The Court states, "The authoritative, and usually final, indicator of the meaning of a provision is the text--the actual words used." Id. at para. 57. And rather than just subsuming the Wisconsin Constitution into the First Amendment, the Court lets the different and broader language speak for itself, and more firmly root its holding.

Finally, though agreement by the U.S. Supreme Court is not the final word on the objective correctness of a legal opinion, it is noteworthy that the Coulee decision, only a 4-3 decision at the time, received significant validation when the United States Supreme Court came to the same conclusion unanimously in a similar case just over 2 years later. See Hosanna Tabor v. EEOC, 132 S. Ct. 694 (2012).

40. In one page or less, name one of the worst United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

Lee v. Weisman, 505 U.S. 577 (1992)

In 1989, a principle at a middle school in Providence, Rhode Island invited a Jewish rabbi to lead a voluntary prayer at the voluntary graduation ceremony. The parents of one student objected, arguing that the First Amendment prohibited such an invitation. The United States Supreme Court agreed. As a policy matter, it is not clear to me that government-led prayers in public school are an altogether good thing. My disagreement with this case rests upon its weak jurisprudential foundations.

First, legal analysis of a constitutional provision should begin with the original public meaning of the clause itself. This case does none of that. The Establishment Clause was, at least in large part, a federalism provision leaving regulation of religion to the states. But even accepting that it has some enduring application against state and local action, it can't be read to proscribe activity the authors of the First and/or Fourteenth Amendments would have understood to be very much in compliance with the First Amendment, as Justice Scalia's dissenting opinion ably points out.

Second, this case, and Establishment Clause jurisprudence generally, looks very little like law. Much of it has the symptoms of a Court discussing desireable social policy or the proper place of religion in public life, and then crafting a legal rule that makes sense in light of that policy. This

is not how judges should make law; that is the legislature's job absent violation of a clear constitutional imperative.

Third, the opinion is filled with plain-old bad reasoning. Its conclusion that students are being coerced by the government into religious activity rests on two dubious propositions--that being present and respectful during a corporate prayer means acceptance of it, and that children are too impressionable to expose dissenters to the peer pressures of a roomful of people praying. Life in civil society requires us to stand or sit respectfully in all sorts of situations where we may have personal disagreements. The government would no more be forcing me to practice religion against my conscience by forcing me to listen to a Buddhist prayer than it would be abridging my free speech rights by forcing me to listen respectfully to a speech by a politician with whom I disagree. Similarly, students here are not forced to recite the prayer, but merely to listen to it if they attend the voluntary graduation ceremony. Even accepting the non-coercion principle, this was not coercion.

Thus, the opinion may or may not reach a desireable social policy outcome. But it is not the kind of legal reasoning, either in quality or in first principles, that should mark the judicial craft. Courts are at the nadir of legitimacy when their decisions set social policy for the people without grounding it in the constitutional text the people themselves have adopted.

41. In one page or less, describe your judicial philosophy.

A judicial philosophy must begin with a sober sense of the judiciary's role in our constitutional system. The framers of our federal and state constitutions created a tri-partite system of government; the legislative branch (generally with the consent of the head of the executive branch) makes the laws, the executive branch executes the laws duly enacted, and the judiciary declares--when cases come before it--what the law is as applied to the facts of that case.

This means that, excepting certain discretionary determinations like sentencing, personal political values should not have a place in the judicial task. Faced with litigation laden with political and policy implications, the judge must simply say what the law says. This is easy to say, but hard to do. In practice, every judge will face the temptation to allow his or her own biases--we all have them--to color a judicial determination. Resisting this temptation requires both moral and intellectual courage, as well as a healthy dose of humility and self-awareness.

This does not mean, of course, that judges are impotent and must always defer to the legislature. Indeed, the people are sovereign, and the people have adopted a written Constitution that is supreme over the statutory enactments of legislatures. A court striking down a statute as unconstitutional is inherent in the power to say what the law is. A court must declare statutes conflicting with the higher law adopted by the people in a constitution invalid; to not do so is abdication of the judicial role. The danger, of course, is that some see the constitution as primarily about "fairness" or "justice" and use it to overrule the supposedly inferior policy choices of the people. Again, the judicial branch may say what the law is when properly

presented with a case, but it must resist the temptation to assume the power of judicial review with respect to legislation it simply finds personally offensive.

Finally, a judge's power to declare what the law is must be rooted in the proper interpretive tools. Statutes should be read to say what they actually say. Constitutions should be read consistent with the original public meaning of its terms. Interpretation begins, and usually ends, with a proper analysis of text, context, and structure. Lower courts should adhere to precedent. And judicially created analytical frameworks should be tethered to the text and provide clear notice and application to those it regulates.

42. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

43. Describe any other information you feel would be helpful to your application.

WAIVER AND AUTHORIZATION:

I hereby authorize any person acting on behalf of the Governor or his staff to seek information related to my interest in appointment as judge. I further authorize any recipient of a request for information from the Governor or his staff to provide such information for consideration of my application.

_____ _____

(Date) (Signature of Applicant)

NOTICE OF DISCLOSURE:

I acknowledge and understand that this application and supporting materials, when submitted to the Governor of Wisconsin, generally becomes public record. I therefore understand that this means my name, the fact that I have applied to be appointed as a judge, and my application materials could be released to the public.

_____ _____

(Date) (Signature of Applicant)

Please note that under certain, limited circumstances, applications for appointed positions may be exempt from disclosure under the public records law. If you wish your application to remain confidential to the extent allowed by law, please send a request to that effect in writing along with your application.

Such a request does not ensure that your application will remain confidential. In general, you should expect that all materials submitted will be disclosed. But the Governor's Office will honor such a confidentiality request to the extent the law allows. A request for confidentiality will not adversely affect your application for appointment.

Question 13(j)

In the past five years, I believe I have received one traffic citation for speeding approximately one year ago in McFarland, Wisconsin. I was going 15 mph over the speed limit, and I paid the fine.

WAIVER AND AUTHORIZATION:

I hereby authorize any person acting on behalf of the Governor or his staff to seek information related to my interest in appointment as judge. I further authorize any recipient of a request for information from the Governor or his staff to provide such information for consideration of my application.

6/15/15 (Date)

(Signature of Applicant)

NOTICE OF DISCLOSURE:

I acknowledge and understand that this application and supporting materials, when submitted to the Governor of Wisconsin, generally becomes public record. I therefore understand that this means my name, the fact that I have applied to be appointed as a judge, and my application materials could be released to the public.

6/15/15 (Date)

(Signature of Applicant)

Please note that under certain, limited circumstances, applications for appointed positions may be exempt from disclosure under the public records law. If you wish your application to remain confidential to the extent allowed by law, please send a request to that effect in writing along with your application.

Such a request does not ensure that your application will remain confidential. In general, you should expect that all materials submitted will be disclosed. But the Governor's Office will honor such a confidentiality request to the extent the law allows. A request for confidentiality will not adversely affect your application for appointment.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 11 DANE COUNTY

JULAINE K. APPLING, JO EGELHOFF, JAREN E. HILLER, RICHARD KESSENICH, and EDMUND L. WEBSTER,

Plaintiffs,

Case No. 2010-CV-4434
Case Codes: 30701, 30704

v.

JAMES E. DOYLE, KAREN TIMBERLAKE, and JOHN KIESOW,

Defendants,
and

FAIR WISCONSIN, INC., GLENN CARLSON & MICHAEL CHILDERS, CRYSTAL HYSLOP & JANICE CZYSCON, KATHY FLORES & ANN KENDZIERSKI, DAVID KOPITZKE & PAUL KLAWITER, and CHAD WEGE & ANDREW WEGE,

Intervening Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO WITHDRAW FROM THIS ACTION, OR, IN THE ALTERNATIVE, AMEND THEIR ANSWER

Defendants James E. Doyle, Karen Timberlake, and John Kiesow ("defendants"), by their attorney Brian K. Hagedorn, file the following brief in support of their Motion to Withdraw From This Action, or, in the Alternative, Amend Their Answer.

INTRODUCTION

In this suit, plaintiffs allege that Chapter 770, which created a new legal status of domestic partnerships,[1] violates the Wisconsin Constitution. Specifically, plaintiffs assert that this legal status violates Article XIII, Section 13 of the Wisconsin Constitution—the marriage amendment. This provision of the Constitution prohibits the recognition and declares invalid any "legal status identical or substantially similar to that of marriage for unmarried individuals."

After receiving notice of plaintiff's suit (originally filed in the Wisconsin Supreme Court), defendants James E. Doyle, Karen Timberlake, and John Kiesow requested representation from Attorney General J.B. Van Hollen. The Attorney General, however, declined representation. In a written letter to the Governor, which is attached to this brief as Exhibit A, the Attorney General explained that he could not defend the law because it was unconstitutional. (Ex. A, p. 1) He explained that if he represented the State, he would "concede that the law is unconstitutional and consent to an order enjoining the domestic partnership registry program." (Ex. A., p. 3)

Following the Attorney General's decision, Governor Doyle hired outside counsel pursuant to Wis. Stat. § 14.11(2)(a)2. Under Wis. Stat. § 14.11(2)(a), the governor has the authority—but not the duty—to employ special counsel in certain cases "if in the governor's opinion the public interest requires such action." Thus, Governor Doyle, using the authority granted to him and using his discretion under this statute, hired outside counsel to defend the constitutionality of Chapter 770. The defendants, under Governor Doyle's direction, moved for summary judgment on December 22, 2010.

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[1] Wis. Stat. 770.001 states in pertinent part, "The legislature finds that it is in the interests of the citizens of this state to establish and provide the parameters for a legal status of domestic partnership."

Nothing in Wis. Stat. § 14.11(2)(a) requires a subsequent governor to continue employing outside counsel to defend an unconstitutional law, however. Governor Walker, in deference to the legal opinion and unique role of the Attorney General as the State's attorney, does not believe the public interest requires a continued defense of Chapter 770.

Accordingly, the defendants now respectfully ask this Court to 1) dismiss them from this civil action because they are no longer a real party in interest, or 2) grant defendants' leave to amend their answer.

DISCUSSION

I. The Court Should Dismiss the Defendants From This Case Because They Are Not a Real Party in Interest.

At this stage of the proceedings, the defendants are not a real party in interest and should be dismissed from this suit.

This is so because there is no dispute between plaintiffs and the defendants. The defendants do not dispute that Chapter 770 is unconstitutional, and no longer wish to defend this law.

Moreover, the Governor has no duty to defend an unconstitutional law or otherwise appoint counsel when the Attorney General declines to defend a law on the grounds that it is unconstitutional. In general, the Attorney General of Wisconsin represents the State of Wisconsin against challenges to Wisconsin statutes. Wis. Stat. § 165.25. However, if the Attorney General cannot undertake such representation, the Governor must decide whether to appoint counsel for such a defense. Wis. Stat. § 14.11(2)(a).[2] The Governor's decision whether to appoint counsel, however, is

[2] Wis. Stat. § 14.11(2)(a) provides:

discretionary. The statute provides that "[t]he governor, if in the governor's opinion the public interest requires such action, may employ special counsel in the following cases." *Id.* The word "may" makes clear that appointment of counsel under this statute is solely within the governor's discretion.

In addition, pursuant to Wis. Stat. § 19.01(1), the Governor is charged with supporting the Wisconsin Constitution. Thus, if the governor determines that defending a law would be contrary to the state's constitution, he cannot order the defense of the law because of this oath to support the Wisconsin Constitution. *See State ex rel. Sullivan v. Boos, County Auditor of Milwaukee County*, 23 Wis. 2d 98, 101-02, 126 N.W. 29 579 (1964).

In this case, however, the law would not be without a defense if the Court dismissed the defendants from the case. The Court has granted a motion to intervene by parties that will competently argue in opposition to plaintiff's position. The Court will also be accepting additional arguments on behalf of amici who will argue for the constitutionality of Chapter 770.

In short, it would waste the time and resources of the parties and the Court to require the defendants' continued participation in this matter. The Court should therefore grant the defendants' motion to dismiss them from this case.

The governor, if in the governor's opinion the public interest requires such action, may employ special counsel in the following cases:

1. To assist the attorney general in any action or proceeding;
2. To act instead of the attorney general in any action or proceeding, if the attorney general is in any way interested adversely to the state;
3. To defend any action instituted by the attorney general against any officer of the state;
4. To institute and prosecute an action or proceeding which the attorney general, by reason of the attorney general's opinion as to the validity of any law, or for any other reason, deems it the duty of the attorney general to defend rather than prosecute.

II. If the Defendants Are Not Allowed to be Dismissed From this Action, the Court Should Grant Defendants Leave to Amend Their Answer.

While the defendants believe dismissal is appropriate, if the Court rules otherwise, defendants seek leave to amend their answer to reflect their current position on the dispute in this case. Section 802.09(1) of the Wisconsin Statutes requires parties to seek leave of the court to amend a pleading six months after the summons and complaint are filed. The summons and complaint of this case were filed August 18, 2010. Accordingly, the defendants respectfully request that this Court grant its motion to amend the pleadings—if dismissal is not granted—because doing so is in the interest of justice.

Leave to amend an answer should be "freely given at any stage of the action when justice so requires." Wis. Stat. § 802.09(1). The court's interpretation of this provision is clear and consistent: the use of the word "freely" indicates the legislature's intent that, as long as there is compliance with the statute, amendments should be liberally allowed so that actions will be tried on the merits. *Wiegel v. Sentry Indem. Co.*, 94 Wis. 2d 172, 184, 287 N.W.2d 796 (1980); *Lak v. Richardson-Merrell, Inc.*, 95 Wis. 2d 659, 669, 291 N.W.2d 620 (Ct. App. 1980), *rev'd on other grounds*, 100 Wis. 2d 641, 302 N.W.2d 483 (1981). Whether "justice so requires" depends on "whether the party opposing [the] amendment has been given such notice of the operative facts which form the basis for the claim as to enable him to prepare a defense or response." *Korkow v. General Cas. Co.*, 117 Wis. 2d 187, 197, 344 N.W.2d 108 (1984).

Relevant factors courts consider include: (1) how long the case has been pending; (2) the time remaining before trial or hearing; (3) how long the movant was or should have been aware of the grounds for the claim or defense raised by the amendment; (4) whether the movant has previously amended the pleading; (5) if the amendment was not

sought until shortly before the trial or hearing, the reasons for the delay; (6) the opposing party's awareness of the claim or defense raised by the amendment; (7) the opposing party's state of preparation for the claim or defense raised by the amendment; (8) whether the amendment raises a claim or defense; (9) the legal or factual validity of the claim or defense raised by the amendment; (10) whether the matters raised by the amendment present an issue of fact for a jury or an issue of law for the court; (11) if new fact issues are introduced, the adverse party's opportunity to contest those issues; (12) whether allowing the amendment would require a continuance to ameliorate the prejudice or unfairness to the adverse party; and (13) if a continuance would be required, whether it would be unfair to the adverse party or the court. *See* Cynthia L. Buchko et al., *Wisconsin Civil Procedure Before Trial* (3d ed. 2007) (citing numerous Wisconsin cases).

In the case at hand, leave to amend the previously filed answer is appropriate and required in the interest of justice.

First, this litigation was recently commenced on August 18, 2010 during the administration of Governor Doyle. A change in administrations is a significant event that should be given significant weight. To allow the previous administration's analysis to bind a subsequent administration would be contrary to what justice requires. While the current administration took office in January of this year, this case presents important issues that required careful analysis. This preparation time precluded action prior to this date. In addition, because this case is still in the early stages and is not on the eve of trial, the timing does not preclude granting defendants' motion.

Second, the defendants' position is not without merit, but rather relies on the legal opinion of the Wisconsin Attorney General. After studying the provision, the Attorney General concluded that "this law is not capable of a constitutional construction" and that "[t]o defend this law would require [him] to ignore the command of the voters when they passed the recent marriage amendment" (Ex. A., p. 2-3) Certainly the Attorney General's strong conclusion demonstrates that this position is, at a minimum, not without merit.

Third, the defendants should be granted leave to amend their answer because the supporters of Chapter 770 would not be harmed or disadvantaged by this position change. Allowing such amendments in no way precludes the action from being "tried on the merits" because of the presence of interveners in this case. In fact, the reason the interveners likely chose to get involved in this case—and the reason the Court explicitly gave for granting intervention—is because of this scenario, i.e., the election of a governor who would not agree with the litigation strategy undertaken by Governor Doyle.

For the reasons provided above, if the defendants are not dismissed from the case, leave to amend their answer is in the interest of justice and should be granted.

CONCLUSION

This administration does not believe the interests of the State of Wisconsin support a continued defense of Chapter 770. Accordingly, the defendants respectfully ask that the Court dismiss them from this case because they are no longer a real party in interest, or, in the alternative, grant defendants leave to amend their answer.

Dated this 13th day of May, 2011.

By: 

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

Floor Company,

Plaintiff,

v. Case No. 2020-CV-12345

Wood Company,

and

Michelle Wie,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE JUDGE JOHNSON'S CONTEMPT RULING

INTRODUCTION

In December 2006, Co-Defendant Wood Company hired Co-Defendant Michelle Wie away from Plaintiff Floor Company. Both Wood and Floor are in the wood-flooring supply business. Floor had a non-competition agreement with Wie that prohibited her from, among other things, soliciting current clients for one year following Wie's departure. Floor soon learned that Wie was doing just that in her new employment with Wood, and filed a motion on January 4, 2007 seeking a temporary injunction enforcing the non-compete agreement and a temporary restraining order ("TRO") against Wie. Judge Johnson granted the motion on January 7, 2007.

Several weeks later, Floor learned that Wie was continuing to solicit Floor's clients, with Wood's knowledge and assistance, in violation of the non-compete agreement and the TRO. On February 1, 2007, Floor moved the circuit court for a contempt ruling against Wie for her violation of the TRO. The circuit court granted that motion on February 8, 2007.

Wood is now attempting to prevent Floor from presenting these facts to the jury. Wood filed a motion in limine to exclude evidence of the contempt ruling against Wie for violation of the TRO. Wood argues that, while the underlying facts may be relevant, the contempt ruling itself is not and should be excluded. (Mot. at 1-2.) Wood also suggests that, even if the contempt ruling is relevant, it should be excluded because it will confuse the issues, mislead the jury, cause undue delay, and waste time. (Mot. at 2.)

As set forth more fully below, the Court should reject Wood's motion and allow evidence of Wie's violation of the TRO and subsequent contempt ruling because this evidence is highly relevant to Floor's claim for punitive damages and will not unfairly prejudice Wood.

ARGUMENT

I. Evidence Regarding Wie's Violation of the TRO and Subsequent Contempt Citation Is Highly Relevant to Floor's Claim for Punitive Damages.

Punitive damages serve the dual purposes of punishment and deterrence. Trinity Evangelical Lutheran Church v. Tower Ins. Co., 2003 WI 46, ¶50, 261 Wis. 2d 333, 661 N.W.2d 789. Punitive damages may be awarded "if evidence is submitted showing that the defendant acted . . . in an intentional disregard of the rights of the plaintiff." Wis. Stat. § 895.043(3). A person acts in intentional disregard of another's rights if he or she acts "with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded." Strenke v. Hogner, 2005 WI 25, ¶3, 279 Wis. 2d 52, 694 N.W.2d 296. The conduct also must be deliberate, it must actually disregard the plaintiff's rights, and it must be "sufficiently aggravated" to entitle a plaintiff to punitive damages. Id., ¶38.

If entitled to punitive damages, the jury will need to determine the appropriate amount of damages. Factors the jury must consider include "the grievousness of the defendant's acts, the degree of malice involved, the potential damage which might have been done by such acts as well as the actual damage, and the defendant's ability to pay." WI JI-CIVIL 1707.1.

In Count III of the Amended Complaint, Floor asserts a claim for punitive damages against Wood in addition to its claims for compensatory damages. Floor alleges that Wood either deliberately disregarded its rights under the non-compete

agreement, the temporary restraining order, and the temporary injunction, or that it was aware its actions were substantially certain to result in the disregard of Floor's rights. (See Am. Compl., ¶67.) Floor has also alleged that Wood's actions were "sufficiently aggravated" to support an award of punitive damages. (Id., ¶68.) Because Floor has asserted a prima facie case, it is entitled to present evidence to prove its claims. See Wis. Stat. § 895.043(3) & (4).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Under this standard, there is a strong presumption that proffered evidence is relevant. State v. Richardson, 210 Wis. 2d 694, 707, 563 N.W.2d 899, 904 (1997).

Other courts have recognized that violation of court orders, contempt citations, and injunctions are relevant to punitive damage claims; such conduct is particularly relevant for showing the aggravated or elevated nature of the conduct. See, e.g., Arthur Young & Co. v. Kelly, 623 N.E.2d 1303, 1309 (Ohio Ct. App. 1993) (punitive damages were appropriate in view of flagrant violations of a non-compete agreement that were unable to be deterred through injunctions, contempt orders and other sanctions); Coonis v. Rogers, 429 S.W.2d 709, 716 (Mo.

1968) (punitive damages were appropriate for appellant who breached a non-compete agreement and then violated the court injunction by continuing to serve and solicit old and new customers); Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, 510 N.W.2d 153, 157 (Iowa 1993) (punitive damages were appropriate in view of breach of a settlement agreement and violation of a temporary injunction); Wolf v. Wolf, 690 N.W.2d 887, 894 (Iowa 2005) (punitive damages were appropriate and not excessive because the violation of court orders displayed a disregard for the other party's rights and for the legal system itself).

It is difficult to see how Wood can plausibly claim the contempt citation is not even relevant. The blatant violation of the TRO by Wie, with Wood's knowledge and assistance, leading to the contempt citation, is strong evidence of Wood's intentional, deliberate conduct, its knowledge of the consequences of its conduct, and the particularly aggravated and grievous nature of its conduct. Without the evidence of the TRO and the contempt citation, Floor would be without a significant arrow in its quiver to prove it is entitled to punitive damages. In short, the contempt citation itself is not only probative, it provides significant factual support for Floor's punitive damages claim.

II. Wood Has Not Shown That It Will Be Unfairly Prejudiced by Admission of Evidence Regarding Wie's Violation of the TRO and Subsequent Contempt Citation.

Wood also contends that, even if relevant, presenting the jury with evidence regarding the TRO and Wie's contempt citation will confuse the issues, mislead the jury, cause undue delay, and waste time. Thus, Wood argues, it should be excluded. (Mot. at 2, citing Wis. Stat. § 904.03.)

The court here must balance the relative interests. In order to be successful, Wood must show that the probative value of the evidence is "substantially outweighed" by these other factors. Wis. Stat. § 904.03. As the rule favors admissibility, if the probative value of evidence is close or equal to the prejudicial effect, the evidence must be admitted. State v. Brewer, 195 Wis. 2d 295, 310, 536 N.W.2d 406, 412 (Ct. App. 1995).

Simply put, Wood has not attempted to explain why presentation of these facts will confuse the issues, mislead the jury, cause undue delay, or waste time; it merely states that it will. Wood has also not explained how, even if confusion or delay would result, this would outweigh the significance of these facts for Floor's punitive damages claim.

Wood's concern may simply be that, when presented with the contempt citation for violation of the TRO, the jury will think badly of Wood. That is not a legitimate basis for excluding

evidence, however. Punitive damages exist to punish and deter defendants who act badly by deliberately disregarding others' rights. The fact that the jury may think badly of Wood when shown evidence that Wood acted deliberately and with full knowledge that it was violating Floor's rights is not an example of unfair prejudice. See Christensen v. Economy Fire & Cas. Co., 77 Wis. 2d 50, 61-62, 252 N.W.2d 81, 87 (1977) ("'Unfair prejudice' does not mean damage to a party's cause, since such damage will always arise from evidence contrary to a party's contentions."). Relevant evidence that supports Floor's punitive damages claim cannot be excluded because it makes Wood look bad. If that were the rule, no punitive damages claim could ever be proven.

In short, Wood has not met its burden of showing that the probative value of Wie's violation of the TRO and subsequent contempt ruling is substantially outweighed by other countervailing interests.

CONCLUSION

Wood seeks to exclude evidence regarding Wie's violation of the TRO and subsequent contempt citation. However, this evidence is highly relevant to Floor's claim for punitive damages. Wood has not demonstrated that it will be unfairly prejudiced by presentation of this relevant evidence. As such, Wood's motion in limine should be denied.

Dated this 14th day of March, 2009.

BRIAN K. HAGEDORN (WBN 1061490)

_____
Attorney for Plaintiff, Wood Co.

GOV Judicial Appointments

From: Jim Morrison [redacted]@gmail.com>
Sent: Saturday, June 13, 2015 10:11 AM
To: GOV Judicial Appointments
Subject: Brian Hagedorn

I have known Brian since he was a law clerk for Justice Gableman, through my application for a judicial appointment and recently when he made a number of very constructive suggestions as to how we could improve relations between the judiciary and the Governor's office as well as the Legislature. With his help a number of us were able to implement those suggestions in the budget process and will be able to do so with the new judicial admInistration going forward.

Throughout all of these experiences Brian has shown himself to be very intelligent, open minded, principled and guided by conservative principles. He has acquitted himself at all times with the utmost professionalism in every endeavor.

I was very impressed with process for selecting and vetting judicial appointments run under his supervision. It was a very robust and fair method of selecting judicial appointees and demonstrated his commitment to the rule of law.

I know that he will bring those traits to the Appellate Court. I urge your very serious consideration of Brian for this very important appointment.

Jim Morrison
Cell 715-[redacted]

GOV Judicial Appointments

From: Jim Morrison <[redacted]@gmail.com>
Sent: Sunday, June 14, 2015 2:58 PM
To: GOV Judicial Appointments
Subject: Endorsements of Hagenow and Koshnick

I have provided endorsements for both of these excellent candidate for the District II Court of Appeals vacancy. I did not do so frivolously. They are both excellent candidates.

Jim Morrison
Cell 715-[redacted]

Jacob J. Curtis

[redacted] • Grafton, WI 53024
414-[redacted] • [redacted]@gmail.com

June 14, 2015

Office of Governor Scott Walker
115 East Capitol
Madison, WI 53702

Dear Governor Walker:

It is a privilege to write a letter in support of Brian Hagedorn's nomination to the District II Court of Appeals. As an attorney navigating my own way through the ever-changing legal landscape, I have looked up to Brian as both a personal and professional role model. Brian's unique career has provided him with the necessary tools to serve as an effective appellate judge. Brian has consistently worked at the intersection of law and policy, an experience that has instilled in him a deep respect for the role of the jurist in our constitutional system. Perhaps more importantly, I know him personally to be a humble servant focused on his family, faith, and conservative principles. I can think of no better traits for a judge to possess and no better person to serve this great state than Brian.

Brian has been exposed in a short amount of time to a variety of experiences. Many attorneys could go entire careers without observing the type of situations Brian has in his various roles. Brian has worked as a litigator at Wisconsin's flagship business law firm. He has served in the Wisconsin Department of Justice. He has clerked on the Wisconsin Supreme Court. And now he serves as your legal counsel. Almost all of these challenges have put him in a position where he must weight competing decisions within the context of an ever-shifting legal landscape and public policy terrain.

Throughout all of these professional journeys, Brian has consistently exhibited a fierce adherence to the precept that judges must be constrained in their interpretations. Respect for precedent and an appreciation for the delicate balance mandated by our system of separate but equal branches of government are qualities Brian has embraced throughout his career. While some attorneys may be able to boast of having spent decades in the courtroom, Brian has the unique advantage of having observed the confluence of policy and law and a judge's (in particular an appellate judge's) solemn duty in resolving disputes between the two.

I would be remiss if I did not take a moment to comment on Brian's personal character. In addition to having a deep professional respect for Brian, I have often

found myself struck by his devotion to faith and family. This devotion manifests itself in the form of a humble character – a key characteristic in any effective judge. As John Adams famously noted, we are "a government of laws, and not of men." While the responsibility we place in our judges is certainly profound, ultimately we are placing our trust not necessarily in the individual, but in the individual's ability to impartially interpret the law and make an appropriate decision. This decision should not be based on a personal opinion as to what the law should be, but on a reasoned judgment as to whether a law enacted comports with our constitutional framework.

Brian's humble character leads me to believe he is most ready to assume this solemn responsibility. I encourage you to consider Brian for this role, recognizing his unique legal experiences and his servant character.

Sincerely,

Jacob J. Curtis, Esq.

REBECCA G. BRADLEY
6928 Grand Parkway
Wauwatosa, WI 53213

June 14, 2015

Office of Governor Scott Walker
Attn: Chief Legal Counsel
115 East State Capitol
Madison, WI 53702

Re: Wisconsin Court of Appeals District II Vacancy

Dear Governor Walker:

I write this letter of recommendation on behalf of Brian Hagedorn, who seeks appointment to the Wisconsin Court of Appeals - District II. Brian is one of the brightest constitutional law scholars in Wisconsin. He has a well-developed understanding of the proper role of the judiciary and a judicial philosophy that emphasizes adherence to a textualist interpretation of the law and judicial modesty. Brian unquestionably understands the duty of a judge to say what the law is and not what he may wish it to be.

Brian's various professional experiences, including a law practice with the largest law firm in Wisconsin, a Wisconsin Supreme Court clerkship, and as an Assistant Attorney General in the Wisconsin Department of Justice, have prepared him well to serve as an appellate judge. Each of his professional positions has expanded the depth and breadth of Brian's legal expertise. Brian has a demonstrated love for the law as evidenced by his involvement in organizations such as the Federalist Society. Brian is also a dedicated public servant, demonstrated by having spent the great majority of his legal career in public service in Wisconsin.

The people of the Wisconsin would be well-served with Brian in the role of an appellate judge. Brian brings an exemplary work ethic to every responsibility he undertakes. He is highly intelligent, capable of analyzing complicated issues, and possesses a keen sense of logic. His command of complex legal principles is extraordinary and his ability to respectfully debate and discuss issues of law would be a particular asset on the appellate bench. Brian has served the people of Wisconsin with distinction. He also demonstrates the highest moral character and an affable demeanor well suited to service as a judge. I highly recommend Brian for appointment to the Wisconsin Court of Appeals.

Sincerely,

Rebecca G. Bradley

[redacted]
Madison, WI 53703
414.[redacted]

June 15, 2015

Governor Scott Walker
115 East State Capitol
Madison, WI 53701

Dear Sir:

In your executive order creating the Governor's Judicial Selection Advisory Committee (E.O. #29), you specified three qualities you expect in your judicial appointees: legal excellence, uncompromising integrity, and a firm commitment to the Constitution and the rule of law. I have known Brian Hagedorn for ten years, first as a mentor, then as a boss, now as a colleague, and throughout as a close personal friend. I have every confidence that he will embody the virtues you seek for the bench, and that he will emerge as a leader who draws the broader legal culture of our state toward the same high ideals.

Brian and I first met at an RPW fundraiser when he was an associate at Foley & Lardner and I was a law student at Marquette. We subsequently saw one another frequently, often at events for The Federalist Society. We remained friends through his clerkship with Justice Michael Gableman of the Wisconsin Supreme Court. I was pleased to see Brian pursue public service following his clerkship, first at the Department of Justice briefly, then as your Chief Legal Counsel. In the latter post, Brian and I worked together virtually every day which I served as his deputy from August 2012 to December 2013. And for the last eighteen months, I have worked closely with Brian as colleagues in your administration.

Based on that decade of experience, I am confident in concluding that Brian exemplifies the attributes you desire in a judicial appointee—attributes that every practitioner and every citizen should want as well: excellence, integrity, and demonstrated dedication to the rule of law.

Brian is an excellent lawyer, easily in the top five percent of the profession. He graduated from Northwestern University, a top-tier law school. He started his career at Foley & Lardner, the top firm in Wisconsin. He clerked on the state's highest court, and during his service the Gableman chambers produced several notable opinions, especially the landmark religious liberty decision in *Coulee Catholic Schools v. Labor & Industry Review Commission*, 2009 WI 88.

I think it hard to contest the claim that Brian has had an extraordinary tenure as your chief legal counsel, handling an incredibly challenging portfolio with excellence, integrity, and good cheer. During my time as his deputy, we worked on some of the most complex and consequential litigation in the state's recent history, including *Frank v. Walker*, 17 F.Supp.3d 837 (E.D. Wis. 2014) (federal challenge to voter identification statute); *League of Women Voters v. Walker*, 2013 WI APP 77 (state challenge to voter identification statute); *Coyne v. Walker*, 2015 WI APP 21 (teachers' union challenge to administrative rules reforms); *Planned Parenthood of Wisconsin v. Van Hollen*, ____ F.Supp.3d ____ (W.D. Wis. 2015) (abortion clinic challenge to admitting privileges requirement); *Wisconsin Education Association Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) (federal challenge to Act 10); and *Madison Teachers Inc. v. Walker*, 2014 WI 99 (state challenge to Act 10). As chief counsel, Brian led a team of lawyers in the Governor's Office, the Department of Justice, and various state agencies to defend several of your signature legislative accomplishments. I watched up close as Brian crafted the arguments for the various claims, often serving as the primary architect for our legal theories. In each case he saw the big picture, framed the arguments to fit an overall theme, and then brought the briefs in line with his vision. Brian has a special ability to reach straight to the core of a case, to find the key concept that shapes the entirety of the argument. This quality will serve him well deciding cases on the Wisconsin Court of Appeals.

Moreover, often the foundational insights Brian identifies stem from his unwavering commitment to the first principles of our constitutional order: respect for text, the separation of powers, and the rule of law. Brian not only wanted to win these cases, but to win them with the right reasoning, because he was genuinely convinced that the law supported our position.

The same commitment to first principles drove his oversight of your judicial nominations process. If you want to know what kind of judge Brian will be, look at the judges he has recommended for appointment. Take, for instance, the three sitting Wisconsin Court of Appeals judges you have previously selected. Rebecca Bradley, Tom Hruz, and Mark Gundrum are all outstanding lawyers and solid judicial conservatives. Together with dozens of circuit court judges and district attorneys, these appointees now form a critical mass of leaders in the law who share your vision for the judiciary.

Litigation and judicial appointments are barely half of Brian's workload as chief counsel—he is also the leading ethics lawyer for your administration, the steward of public records in an intensely scrutinized office, and the point person on legislation involving legal policy issues such as election administration, administrative rules, and tort reform. In each of these roles, Brian brings the same keen legal intellect, personal integrity, and commitment to the Constitution.

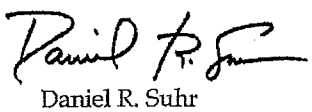
If you appoint him to the Court, I expect Brian's judicial service will be marked by two characteristics. First, he will make substantial contributions to the law through his published opinions dealing with various areas of legal doctrine. On average, a Court of Appeals judge writes nine published opinions per term. By law, these decisions must be important for not only the parties to the case, but to the state as a whole (Wis. Stat. 809.23); to illustrate, the Legislative Reference Bureau makes 650 citations to Court of Appeals opinions in its annotated version of the Wisconsin Constitution. Brian's opinions will frequently be among those so cited, because they will be thorough, scholarly, well-reasoned, and well-written.

Second, he will make substantial contributions to the law through the platform offered an appellate judge. Brian may well model himself on the recently deceased Court of Appeals judge Ralph Adam Fine, who taught as an adjunct professor, published several books and numerous articles, and lectured frequently before professional and lay audiences, in addition to his remarkable corpus of opinions. I expect that in a similar way, Brian will use this opportunity to be a thoughtful advocate for constitutional first principles in our state, serving the bar and broader community through his activities.

As I conclude, let me quote Judge Michael Brennan, chairman of your judicial selection advisory committee, who memorialized Judge Robert W. Warren by saying, "He used to the fullest the gifts God gave him—intelligence, integrity, leadership, and moral strength." 290 F.Supp.3d XLIX, LI (E.D. Wis. 2001). The same verdict characterizes Brian's tenure as the chief counsel in your administration these past 4.5 years. And it will be equally true of his service on the Wisconsin Court of Appeals.

Thank you for the opportunity to offer these thoughts.

Respectfully yours,



Daniel R. Suhr

CRAMER, MULTHAUF & HAMMES, LLP
ATTORNEYS AT LAW

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June 15, 2015

VIA E-MAIL
govjudicialappointments@wisconsin.gov

Office of Governor Scott Walker
115 East, State Capitol
Madison, WI 53702

Re: Brian Hagedorn's Application for the District II Court of Appeals Judgeship

Dear Governor Walker:

I am writing to offer my strong endorsement of Brian Hagedorn's candidacy to fill the vacancy on the District II Court of Appeals. A good appellate judge must possess intelligence, diligence, an even-keeled temperament, wisdom, commitment to scholarship, and a sharp pen. These are all traits that I have associated with Brian since we met six years ago when I was a third-year law student interning for Justice Michael Gableman and Brian was serving as the Justice's law clerk. During my semester-long internship, Brian took it upon himself to offer tutelage and guidance that went above and beyond what was expected. The lessons I learned from him on how to approach legal issues proved invaluable during my own clerkships (including one with Justice Gableman) and into my career in private practice.

As a practicing attorney, I recognize how important it is to have predictability and stability in the law. It is therefore essential that judges have a proper understanding of their role in our constitutional system. As Alexander Hamilton stated in Federalist No. 78, "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." The people of Wisconsin would never have to fear a violation of Hamilton's edict from a Judge Hagedorn.

I am proud to count Brian Hagedorn as both a mentor and a friend, and I have every confidence that he would excel as a judge on the Court of Appeals.

Sincerely,

Matthew M. Fernholz

Daniel P. Lennington
[redacted]
Sun Prairie, WI 53590
June 15, 2015

Governor Scott Walker
115 East Capitol
Madison, WI 53702

RE: Judicial Appointment, Wis. Ct. App., Dist. II

Dear Governor Walker:

I am writing to recommend that you appoint Brian Hagedorn to be a judge on the Wisconsin Court of Appeals, District II. I can think of no other attorney in the State who is more suitable or qualified for this position than Brian.

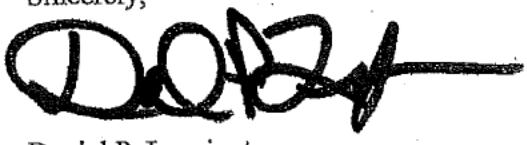
In my capacity as the Assistant Deputy Attorney General during the Van Hollen Administration, and now Assistant Attorney General in the Schimel Administration, I have worked with Brian on several significant lawsuits and many sensitive legal matters. In every instance, Brian has demonstrated a strong commitment to the rule of law and advocated for judicial modesty and the separation of powers. I have absolutely no doubt that he will fulfill these commitments as a judge on the Court of Appeals.

As an attorney, Brian is devoted to the thorough, confidential, and effective representation of his client, the Office of Governor. He is a superb writer, an articulate and effective communicator, and a diligent researcher. Brian is well respected among his colleagues and peers, and as a judge, will be impartial and diligent, at all times committed to the Constitution and the rule of law.

As a final matter, I have also gotten to know Brian on a personal matter during the past three years. He is an honest and forthright man of faith, a devoted father and husband, and a loyal friend.

I strongly recommend Brian for this appointment.

Sincerely,



Daniel P. Lennington
Assistant Attorney General
Wisconsin Department of Justice

MICHAEL BEST
& FRIEDRICH LLP

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Joseph L. Olson
Direct 414.277.3465
Email jlolson@michaelbest.com

June 15, 2015

Honorable Scott K. Walker
Governor, State of Wisconsin
Office of Governor
115 East Capitol
Madison, WI 53702

Re: Brian K. Hagedorn; District II Court of Appeals Judicial Appointment

Dear Governor Walker:

It is with great pleasure that I recommend Mr. Hagedorn for appointment to the District II Court of Appeals.

I have come to know Brian both professionally and personally over the last several years. My interactions with Brian have left no doubt in my mind that he would make an excellent appellate jurist. I came to work closely with Brian when I was appointed as Special Counsel to defend your office in the several lawsuits attempting to have 2011 Wisconsin Act 10 ruled unconstitutional.

In his role as Chief Legal Counsel, Brian was charged with managing the defense of Act 10. As outside counsel, I reported to and collaborated with Brian. During the Act 10 litigation, Brian demonstrated a unique ability to understand the larger picture. Each decision point in a particular case had the potential to impact all of the other cases. An ill-conceived victory in one case could spell disaster in the next. Brian understood this and helped craft a strategy that secured victory in each case without any collateral damage. Perhaps most relevant to a judicial appointment, Brian demonstrated an ability to conceptualize and analyze complex constitutional issues without getting distracted by the publicity that Act 10 generated.

The carryover is obvious. Brian will be a judge who understands that an opinion in one case will necessarily impact other cases. He will be the kind of judge who understands that while one decision might be more immediately satisfying, a judge is called to reach the legally correct result.

Having worked as closely with Brian as I did, I feel I can also say something of the kind of man you would be appointing. The constitutional issues we dealt with came to the fore in a heated policy debate that consumed the public. Through all the noise, politics and at times bizarre rulings, Brian remained committed to achieving a resolution that comported with the correct exposition of the relevant constitutional standards. He did not let himself be distracted or intimidated by the protestors outside his office or the often unfair narrative perpetuated in the media.

These characteristics carry over into Brian's personal life. There too he is a man committee to Truth. He is not swayed by popular sentiment; rather, he is firmly rooted in his faith.

Brian Hagedorn is unquestionably qualified and it is my honor to recommend him.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP

Joseph L. Olson

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Office of Governor Scott Walker
115 East State Capitol
Madison, WI 53702

June 15, 2015

Dear Governor Walker,

It is my honor to recommend Brian Hagedorn for your nomination to District II of the Wisconsin Court of Appeals. A top-rate conservative mind of the highest character, Brian will represent you and the state of Wisconsin honorably.

Both in Wisconsin and across the country, we are in dire need of judges who can respect the rule of law. Tempted by the sirens of a "living" constitution, judges too often default to rulings that, while politically popular, amount to dictating public policy from the bench. In Wisconsin, judges continue to threaten the reforms that you and the legislature enacted. Nationally, judges rubber stamp the out-of-control executive branch of the Obama Administration. At this point in our history, there is absolutely no doubt in my mind that Brian Hagedorn is the type of principled conservative that we need on the judiciary.

I have known Brian ever since I was a law student at Marquette. As a legal intern in your administration, I worked for him, performing legal research and writing. He would always challenge me and encourage rich debate; the experience was incredibly rewarding for a law student.

Currently, I am the education policy director and associate counsel at the Wisconsin Institute for Law & Liberty (WILL), a conservative law center in Milwaukee. When appropriate, we have consulted with Brian over legal strategy relating to the litigation of, among other issues, Act 10, the Superintendent of Public Instruction's constitutional power to supervise public education, and campaign finance and First Amendment. These discussions gave me a unique perspective into Brian's legal mind – it is as sharp as his intellect – and how he deliberates. Always interested in other people's opinions and their reasoning, he would keep meetings moving along and productive.

Our work together also gave me an insight into Brian's judicial philosophy. He has solid

conservative credentials that matter in the constant struggle between a judicial ideology that favors an ever-changing constitution versus one that safeguards our freedoms based upon the vision of the Founding Fathers. As Vice President of the Federalist Society Milwaukee Chapter, I am well verse in this debate. While Brian is a legal foot soldier in this battle, his moderate temperament is a virtue in attempting to persuade others. Because of this, he is very well known and respected in conservative legal circles in Milwaukee, Madison, and Washington D.C. His appointment to the bench will surprise few and please many.

One could go on about Brian's law credentials; however, perhaps, most significantly about him is that he is a man of exceptional character. When one studies his background - Northwestern Law School, attorney at Foley & Lardner, clerking for Justice Gableman in the Wisconsin Supreme Court – it is evident that he could have a very lucrative career in the private sector. Yet, time and time again, Brian has forgone such opportunities, opting instead to serve the public by working in your administration. Wanting to be a judge on the Court of Appeals only solidifies this passion for public service.

A strong follower of Christ, Brian has allowed God to guide him through his journey. It has helped develop him to be a man of high moral character; he is active in his church and community. Brian's decision to adopt children speaks more about him than perhaps anything else.

Governor, I can say with complete certainty that you will not find a better person with a stronger conservative intellect for the bench than Brian Hagedorn. Please feel free to reach out to me if you wish to discuss his nomination further. My contact information is below.

Sincerely,
CJ

Charles J. Szafir
Associate Counsel and Education Policy Director
Wisconsin Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee, Wisconsin 53202
414-727-6373 (direct) - CJ@will-law.org

June 15, 2015

Dear Judicial Appointment Committee,

The purpose of this letter is to provide a reference for Brian Hagedorn. I have known Brian for 18 years since we met in college where we became roommates and close friends. We served each other as "Best Man" in our weddings and our families have remained close to this day.

As a pastor of a local church in the Milwaukee area, I have the opportunity to witness strong families as well as struggling households. I serve people with robust morals as well as those with destructive tendencies. I interact with people from all walks of life and I can confirm unreservedly that Brian Hagedorn is a man of remarkably strong character.

Brian is trustworthy, honest and exudes integrity. He conducts his affairs according to the highest moral standards. Brian holds to an exceptional work-ethic and faithfully executes the responsibilities with which he has been entrusted.

Brian is a highly analytical thinker skilled at researching and understanding complex situations. He is intelligent, sharp, and reasonable. Brian is an innovative problem-solver who is an exceptional listener and who offers impartial counsel. He effectively seeks to understand people, their concerns, and their desired outcomes.

Brian is exceedingly articulate in both the written and spoken word. He is a perpetual student and life-long learner of history, philosophy and public policy. Brian is an outstanding debater who presents solid argumentation while showing honor and respect towards those who hold a contrary opinion.

I believe these characteristics, along with his service to the State of Wisconsin, contributed to Brian being awarded Alumni of the Year from Trinity International University in 2014.

Perhaps Brian's greatest accomplishment is his dedication to raising his family with his wife Christina. The two of them have four well-rounded children together. They have provided a loving home for a fifth child through adoption. As a family, they champion diversity and model multicultural sensitivities as they frequently provide housing, child-care, and essential supplies to single moms and struggling families in need.

I believe the State of Wisconsin would be well served by the appointment of Brian Hagedorn to the Court of Appeals. I wholeheartedly and enthusiastically recommend Brian without reservation.

Sincerely,

Joe Martinez
Senior Pastor
Harvest Community Church
6612 South Howell Ave.
Oak Creek, WI 53154
(414)[redacted]
PastorJoe@HarvestCommunity.org

THE VINE CHURCH
GOSPEL. COMMUNITY. MISSION.

June 13, 2015

To Whom it May Concern:

I highly recommend Brian Hagedorn as a candidate for judgeship in the Wisconsin Court of Appeals. I have worked extensively with Brian since the year 2010 through his service and leadership at The Vine Church, an Evangelical Free Church in Madison, Wisconsin. Shortly after his family began attending he became a member of the church and served in numerous ways. Some of the areas in which he served include teaching in our Next Generation ministry to children and families, facilitating the liturgical elements within our worship services, and leading one of our small groups of ten to twenty adults that meets in his home during the week.

Brian has excellent communication skills. In addition, he is well organized and extremely hard working. He is also committed to upholding ethical standards that are consistent with his beliefs and he graciously applies those standards both as an individual and within his family. Brian has always expressed great care towards others within the church and is known as a leader who loves and cares for people while also encouraging them to live in a way that is consistent with their Christian faith and ideals.

Brian will be a tremendous asset to the judicial system within the state of Wisconsin. If you have any further questions regarding his background or qualifications, please do not hesitate to contact me.

Sincerely,

Scott Sterner

Pastor
The Vine Church
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ssterner@thevinemadison.org

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June 15, 2015

VIA EMAIL

Office of Governor Scott Walker
115 East Capitol
Madison, WI 53702
govjudicialappointments@wisconsin.gov

RE: Letter of Recommendation for Appointment to District II Court of Appeals-Brian Hagedorn

Dear Governor Walker:

I am writing to offer my support for Brian Hagedorn's appointment to the District II Court of Appeals.

I had the privilege of clerking with Brian at the Wisconsin Supreme Court during the 2009-2010 term. As law clerk to the Honorable Michael J. Gableman, Brian applied the Wisconsin Constitution faithfully. He understood and took care to maintain the proper role of the judiciary in relation to the legislature. He interpreted and applied the Wisconsin Statutes as written, even if it meant disagreeing with the end result. I have no doubt that Brian will pay the law the very same respect as a court of appeals judge.

Clerking, particularly at the appellate level, provides a unique insight into the judiciary that few attorneys experience. Brian can appreciate how a holding in one case affects not only the parties to that case—but every party, in every case that follows. He has experience weighing both sides of an argument while applying the appropriate standard of review and paying deference to the factual findings of the jury or circuit court judge. And on a more practical level, Brian is a careful researcher and a very skilled legal writer. These qualities are far too rare. As practitioners, we all hope for judges who will simply do their jobs and do them well. Brian will exceed our expectations.

Please consider appointing Brian Hagedorn to the District II Court of Appeals. The state will be better for it.

If you have any questions or require any more information, please do not hesitate to contact me.

Very truly yours,

Stacy A. Alexejun

SALEXEJU:els

ANNETTE K. ZIEGLER
5582 County Road Z
West Bend, WI 53095

June 13, 2015

Office of Governor Scott Walker
Attn: Chief Legal Counsel
115 East State Capitol
Madison, WI 53702

Subject: Court of Appeals District 2 Appointment

Dear Counsel:

I write this letter of support for Brian K. Hagedorn. I understand that the Governor will have the opportunity to fill the District 2 Court of Appeals vacancy. Brian would be the kind of judge that would follow the Rule of Law and dispense justice fairly and impartially.

I first came to know Brian through his clerking at the Wisconsin Supreme Court for the Honorable Michael J. Gableman. He is a hard worker who is able to tackle tough issues and reach sound legal conclusions. I also know that his writing skills are superb. Simply stated, he is more than capable to do the job. I believe that Brian would be well suited for the appellate bench given his experience. Brian would not be is not an activist jurist.

I also note that Brian Hagedorn has otherwise demonstrated superior legal skills and thinking by his commendable background and experience. He has served in the public and private sector, has published writings and received awards. I have personally served with him on the Bench and Bar Committee for the State Bar of Wisconsin. He is willing to stand up for his values regardless of what might be the popular choice of the crowd. He also is a family man who has a strong faith. In my view, he surely must stand out in the field of potential candidates.

In short, Brian Hagedorn would be a welcome addition to the appellate bench. I highly recommend him for the appointment.

Thank you for your time and consideration.

Sincerely,

Annette Ziegler

Chambers of
Judge Jason A. Rossell
Circuit Court, Branch 2
Kenosha County Courthouse, Room 124
912 56th Street
Kenosha, Wisconsin 53140-3747
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Wayne Van Lone
(262) 653-2679

June 11, 2015

Governor Scott Walker
Office of Governor Scott Walker
115 East Capitol
Madison, WI 53702

RE: 2nd District Court of Appeals Vacancy

Dear Governor Walker:

Please accept my recommendation of Brian Hagedorn for the current vacancy on the 2nd District Court of Appeals. As I am sure you already know, Brian, is a brilliant legal mind who has the ability to understand the complexities of a situation and apply the appropriate standards and law.

As a Circuit Court Judge, I understand the importance of having an appellate Judge who is able to apply the correct legal standards to the facts of each case. Brian has shown a commitment throughout his career to thoughtfully applying and upholding the rule of law instead of creating law to fit each situation. This is invaluable to the Circuit Court Judges and the general public in their ability to conform their conduct and make decisions on a law which is strong, secure and not shifting.

On a personal level, I have known Brian for many years and he is a man of deep faith and high ethical standards. He has never taken the easy road by sacrificing his ethics or integrity. I believe that he will be a valuable addition to the Wisconsin Court System and I fully recommend him for the position.

Please feel free to contact me regarding this position.

Sincerely,

Hon. Jason A. Rossell

From: Hizmi, Elizabeth - GOV
To: Brian Hagedorn
Cc: Roades, Jennifer - GOV
Subject: INTERVIEW
Date: Friday, June 26, 2015 4:35:00 PM
Attachments: Harvard Journal of Law 1988.pdf
March 2009 WI Lawyer.pdf
What is Living Constitutionalism.pdf
Importance: High

Dear Brian,

The Governor's Judicial Selection Advisory Committee has reviewed and considered all applications for the Wisconsin Court of Appeals – District II vacancy. JSAC has recommended moving you forward in the appointment process. The next step in the process will be an in-person interview. Please see below regarding details confirming your interview time. In preparation for the interview, please review the 3 articles found attached. Please let me know if you have any issues with accessing the attachments.

DATE: Wednesday, July 1st
TIME: 10:15a.m.
LOCATION: Quarles & Brady, 33 East Main Street, Suite 900, Madison, WI 53703

Please note, at this time, we kindly request you to please keep your status in the process confidential.

All the best,

Elizabeth Hizmi / Director of Gubernatorial Appointments
Office of Governor Scott Walker / (608) 266-1212
elizabeth.hizmi@wisconsin.gov

C

Harvard Journal of Law & Public Policy
Winter, 1988

Changing the Law: The Role of Lawyers, Judges and Legislators

Symposium: The First Annual Federalist Society Lawyers Convention-1987

*5 TOWARD A JURISPRUDENCE OF ORIGINAL INTENT

Edwin Meese III [FNa1]

In this article I hope to address more precisely what a jurisprudence of original intent is, what it is not, and its practical relevance not only to the work of lawyers, judges, and legislators, but to the American public generally. To begin, I would like to indicate what is truly at stake in the current debate over constitutional interpretation.

For most of our history, constitutional adjudication or decision-making, as done by judges, was a matter of construing the text of the Constitution itself. Some, such as Thomas Jefferson and Spencer Roane, preferred a strict construction of the text; others, like John Marshall and Alexander Hamilton, were given to a loose construction. But whether the approach was strict or loose, it was still constructionalist or interpretivist. That is, it was assumed that the Constitution possessed a discernible meaning, intended and understood by those who framed, proposed, and ratified its various parts.

Recent decades, however, have witnessed the rise of a radically different approach. Accordingly, constitutional adjudication for certain judges, politicians, and academics today is not primarily a matter of construction at all. They appear to view the United States Constitution as a document virtually without legally significant, discernible meaning. To them, the Constitution is a text whose meaning must be created by judges supposedly sensitive to changing social conditions and, it seems, intoxicated by only the most recent moral or political philosophies. Such constitutional analysis is evident in statements such as "the well-being of our society," "deeply-embedded cultural values," "the living development of constitutional justice," "welfare rights," "the national will," "the right of equal citizenship," or "the settled weight of reasonable opinion."

These extra-constitutional values are given as a basis for determining meaning. For obvious reasons, "non-interpretivism" is the name given this approach. Perhaps it should be called *6 inventionalism because it stands in such sharp contrast to the traditional methods of legal construction.

For the most part, the contemporary universe of constitutional interpretation is made up of those who advocate non-interpretivism and those who argue for interpretivism. [FN1] Non-interpretivists predominate in many law schools today. Judge Bork, in fact, soon after his elevation to the federal bench, remarked that among law faculty members, Ronald Reagan is regarded as one of the greatest reformers of legal education because, by appointing them to the bench, he has removed most of the few interpretivists teaching in our schools.

Yet, the Constitution must be understood as something more than just a lawyer's document. Interpretivism and non-interpretivism are words lawyers use because they show where the lines of debate lie on the issue of how judges should decide cases involving constitutional questions. However, what is ultimately at stake in this debate among

lawyers and judges is far more than constitutional adjudication, although that, to be sure, is very important. What is at stake, most fundamentally, is the nature of the Constitution itself, and in turn, the nature of our political order.

Interpretivism assumes that the constitution is a document of fixed and legally binding meaning. Non-interpretivism assumes that the Constitution is a document that merely provides a starting point for philosophical adventurism. [FN2] The choice between these views has a tremendous impact on the nature of our political process.

History and tradition points to an understanding of the Constitution as a document of fixed meaning, supplied by those who framed and ratified it. Apart from its own terms, there is no better source for the traditional understanding of the Constitution than that of James Madison, who wrote that if "the sense in which the Constitution was accepted and ratified by the Nation ... be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, *7 exercise of its powers." [FN3] Years later, President Martin Van Buren in his Inaugural Address reiterated this understanding of the Constitution. He said, "The principle that will govern me in the high duty to which my country calls me is a strict adherence to the letter and the spirit of the Constitution as it was designed by those who framed it." [FN4] It is only in recent decades that the Constitution has come to be viewed by some judges and scholars as a document of ever changing meaning to be defined, for the moment, by contemporary concepts.

The Constitution does not resolve every or even most political issues of the day, no more of our own time than of any other. It was not intended to do so. But it was intended to, and indeed it does, establish explicit rules as to how the great issues of every age should be decided. This confidence in structure lay at the heart of Madison's and his fellow Founders' theory of limited popular government.

This is not to suggest that the Founding Fathers envisioned a static society. Certainly they did not; the Philadelphia Convention was a meeting dedicated to changing the law as it existed by providing, within the Constitution, the ground rules for both adaptation and change of our basic governmental principles and institutions.

I would like to contribute to the debate over constitutional interpretation by further addressing two questions. First, I would like to consider the purpose of a *written* constitution and what the nature of that purpose suggests for the task of constitutional interpretation. Second, I would like to consider how our constitutional scheme is enforced both by the courts and by the two political branches. The answers to these two questions will help us to better understand our system of *constitutional*, democratic government. In the process, we can better understand why courts engaging in judicial review must be careful to guide their work by the text and original meaning of various specific constitutional provisions.

Clearly, one major purpose of a written constitution is to *8 "constitute" or give structure to a system of government by establishing, describing, and fixing its institutions and component parts. The American Constitution accomplished this purpose with great economy of wording in the original document of 1787. That document set up the three branches of the federal government and granted them each a particular sphere of political authority.

A second purpose of a written constitution is the limitation and enumeration of governmental powers. The fundamental charters of democratic government, including such documents as the Magna Carta and the Mayflower Compact, proceed on the assumption that it is desirable to describe clearly those things which the government can and should do. As President Reagan pointed out in his 1987 State of the Union Address, the American Constitution takes this process one step further by building on the assumption that the federal government can exercise only those powers which are enumerated while all other powers are "reserved to the States, or to the people." [FN5] In contrast, constitutions prior to 1787 generally assumed that governments were omnipotent and could do anything not expressly forbidden by a bill of rights.

A third purpose of a written constitution is to confer democratic legitimacy by formally expressing the consent

of the people to the government's exercises of authority. Thus, in a democracy or a republic (as opposed to a constitutional monarchy or oligarchy), a constitution becomes a social contract by which the people agree to be bound by laws which are made pursuant to and in accord with the Constitution's commands. In such a system, the Constitution may become, as it is in the United States, the principle bulwark of the government's legitimacy.

A fourth purpose of a written constitution is to prevent passing fads and passions in the body politic from overriding fundamental values and principles. Bills of rights in constitutions typically perform this function of preserving basic civil rights that might otherwise give way before the passions of the moment. In this fashion, a bill of rights can help preserve a balance between the need for order and the desire for freedom by bolstering fundamental rights.

*9 Our Constitution's unparalleled historical success is, in part, the result of at least two innovations in the theory of constitutional design that were perfected during the Eighteenth Century by our Founding Fathers, and which allow our Constitution to better accomplish its four aims. The first of these innovations was the fact that it was written. Prior to the American experience, written constitutions were a rarity. Indeed, the great model of constitutionalism up to that time had been Great Britain, whose unwritten constitution was seen as a shining example of how to impose limits on government primarily through reliance on custom and tradition. Partially in response to their own experience with the low reliability of uncodified English guarantees of rights, the Founding Fathers chose to rely on a written document with a defined amendment process.

The Framers thought that only a written constitution with a fixed meaning could be relied upon to limit the arbitrary exercise of governmental power. In addition, as good Lockians, the Framers liked the idea of having a written social contract as their charter of government. Such a contract could embody the popular, democratic consent which the Framers believed essential to legitimizing a system of government. [FN6]

The Framers also employed a second innovation in constitutional design that has proven crucial to the relative success of our American Constitution. That innovation was the deliberate decision to divide power through checks and balances so that, as they said, "Ambition must be made to counteract ambition." [FN7] Our Constitution goes beyond bicameralism and federalism. When properly functioning, this pluralistic division of power preserves freedom by preventing any one institution from accumulating so much authority that it can unilaterally threaten fundamental rights. Accordingly, the Framers's decision to divide power, as with the decision to adopt a written constitution, furthers the goal of constitutional liberty by effectively delimiting authority and by making it harder for passions of the moment to prevail over the preservation of fundamental rights.

This brings me to the second question. Once we understand *10 what the reasons for having a written constitution are, what then is the constitutional scheme by which it was anticipated that the document itself would be enforced?

One popular misconception is that the Constitution is enforced exclusively by the courts. Under this view, the courts exist primarily to rule on constitutional issues and to act as impartial umpires of our entire governmental system. I believe this view overlooks the importance of the self-executing structural features of our Constitution. Each of the three branches of the federal government and all of the state governments help to play an equally important, although often unrecognized, role in the enforcement of constitutional provisions. I mention the states, because the concept of federalism was as fundamental to the Framers as the doctrine of separation of powers. However, confining ourselves to the federal sphere, let us look at the way each of the branches carries out its duty to interpret, apply, and enforce constitutional values in the exercise of its prescribed responsibilities. Often, a judge resolving a case or controversy may well find an obligation under the judicial oath of office to strike down an executive or legislative action. When this is done properly, federal judges breathe life into constitutional guarantees of limited government. They vindicate the balance between order and freedom that was struck when the populace granted its consent to a constitutional system of government.

How, then, do we know when a judge is acting properly in declaring an executive or legislative act unconstitutional? The answer is found by looking at the relevant written constitutional provision and checking to see if it is being enforced according to its plain words as originally understood. If it is, then the judge is properly treating the Constitution as the supreme law and is enforcing the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue. In addition, the judge is helping to preserve limited government by giving practical content and meaning to otherwise nebulous constitutional guarantees. Thus, in those instances in which judges are guided by text and original meaning, the institution of judicial review promotes the purposes of constitutionalism and validates the consent of the governed. The problem arises when the courts do not feel bound by the text or original meaning of a constitutional provision. In such instances courts *11 may sometimes be tempted to add to or subtract from the written constitution. In so doing, judges will sometimes justify what they have done by acting as though we have some extra-constitutional tradition in which doctrine and meaning have no fixed source and hence can be easily changed over time by judicial fiat.

Nothing could be further from the truth. The Framers would have seen no point in drafting constitutional provisions if the courts did not then interpret those written provisions in the same manner as they would interpret any other written legal document, such as a statute, a contract, or a will. Our written Constitution cannot bind or limit discretion or governmental power if it is not interpreted on the basis of an enduring standard. Non-interpretivism is not only contrary to common sense, it is antithetical to the very notion and purposes of constitutionalism.

Non-interpretivism is often exclusively viewed as a means of adding new rights to the Constitution. Those who look at it in that way forget too easily that activist judges can also take away rights. In recent years, courts have sometimes done just that by downplaying and overlooking the principle of enumerated powers and other important provisions of the Constitution, such as the Takings [FN8] and Contracts [FN9] Clauses, which guarantee certain fundamental economic rights.

While our courts should and will continue to play a major role in enforcing and preserving constitutional rights, the judiciary is not the only branch that preserves constitutional rights and promotes the purposes of constitutionalism. Many constitutional questions arise outside the arena of legal disputes or judicial cases and controversies, including the proper conduct of impeachments, the workings of the amendment process, and various decisions with respect to war and foreign policy. Branches other than the judiciary must enforce the Constitution in these areas. This is why the members of all three branches of government have an equal responsibility to uphold and support the Constitution as they apply it in the performance of their duties.

While the courts have generally been quite attentive to protecting constitutional rights, perhaps the other two *12 majoritarian branches of government have sometimes been less cognizant of their responsibilities. The executive branch must be vigilant to assess constitutional issues carefully in making decisions to sign or veto messages, in employing prosecutorial discretion, in issuing pardons, and in deciding whether it can in good faith defend various governmental actions in court. Congress, for its part, needs to be more attentive to constitutional issues as it considers legislation and as it conducts hearings and investigations. In particular, it needs to respect executive prerogatives concerning the conduct of foreign policy, the appointment of public officials, and those other areas of governmental authority assigned to the President and his subordinates.

If all three branches would pull together to protect our Constitution as a charter for a limited national government, then we would need to rely on the courts less often as a protection of last resort. It is the job of the majoritarian branches to ensure, whenever possible, that constitutional problems are addressed before they end up in court. Such attention will help to better fulfill the Constitution's purpose of checking the majoritarian passions of the moment, and of lending democratic consent and legitimacy to the government's constant efforts to balance the claims of order and freedom.

Vigorous debate over constitutional interpretation serves to renew discussion of our founding charter with the same enthusiasm, sense of purpose, and philosophical fervor that characterized the convention in Philadelphia 200

years ago. Let us hope that our current debate, encouraged by the enlightened thought and careful scholarship of the Federalist Society, will lead to similar successful and enduring results.

[FNa1]. United States Attorney General. This article is a lightly edited transcript of Attorney General Meese's remarks at the Federalist Society Symposium on January 30, 1987.

[FN1]. *See* G. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL INTERPRETATION (1986) (defining and analyzing the philosophies of interpretivism and non-interpretivism).

[FN2]. *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

[FN3]. 9 J. MADISON, WRITINGS 191 (G. Hunt ed. 1910).

[FN4]. MESSAGES AND PAPERS OF PRESIDENTS 1536 (1897). *See also* Statement by the President on the Senate's Confirmation of William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice, 22 WEEKLY COMP. PRES. DOC. 1204 (Sept. 17, 1986) ("Judge Rehnquist believes, as I do, that our Founding Fathers did not create the Supreme Court as a kind of supralegislature; that judges should interpret the law, not make it ....").

[FN5]. *See* State of the Union Address, 23 WEEKLY COMP. PRES. DOC. 51-52 (Jan. 27, 1987).

[FN6]. *See* J. GOUGH, THE SOCIAL CONTRACT 128 (1957) (discussing Locke and the philosophy of the social contract).

[FN7]. THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

[FN8]. *See* U.S. CONST. amend. V.

[FN9]. *See* U.S. CONST. art. I, § 10.

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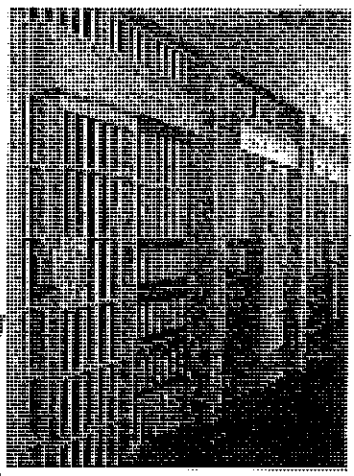
Wisconsin Lawyer
Vol. 82, No. 3, March 2009

The Perils of Plain Language: Statute of Limitations for Child Sexual Assault Defendants

In *State v. MacArthur*, the Wisconsin Supreme Court concluded that the expanded statute of limitation for child sexual assaults must be interpreted literally, not constructively, with the result that some as-yet-undetected child sexual assault defendants may escape prosecution while other defendants may be subject to prosecution without any time limit. The difference in treatment depends on whether the alleged crime occurred before or after July 1, 1989.

by Alex Flynn



The Wisconsin Supreme Court recently decided a complex criminal statute of limitation question in *State v. MacArthur.*[1] The author of this article represented defendant MacArthur, an 86-year-old priest charged in January 2006 with having had sexual intercourse and engaging in indecent behavior with three minor girls between 1965 and 1972.[2] MacArthur argued that the relevant statute of limitation was the one in Wis. Stat. section 939.74(2)(c) and that because this limitation had expired, he could not be prosecuted. Rejecting MacArthur's arguments, the supreme court, in an opinion authored by Justice Ziegler, concluded that the legislature's repeated expansions of the statute of limitation in child sexual assault cases apply only to defendants charged under Wis. Stat. chapter 948, effective July 1, 1989, and not to defendants like MacArthur charged under previous statutes criminalizing sexual contact with a minor. In practice, however, the supreme court's decision actually might mean that some child sexual assault defendants have been wrongly prosecuted under an expanded statute of limitation and that some as-yet-undetected defendants may escape prosecution.

History of Child Sex Crimes Laws

Wisconsin has always severely punished sexual contact with children. Until 1975, the conduct was criminalized by and punished under Wis. Stat. chapter 944.[3] Starting in 1975, the conduct was criminalized by and punished under Wis. Stat. section 940.225.[4] Since July 1, 1989, the conduct has been criminalized by and punished under chapter 948.[5] Under chapter 944 and section 940.225, the statute of limitation for the crime was six years.[6] When creating chapter 948, the legislature began addressing inherent problems in sex crimes prosecutions involving children by expanding the statute of limitation so that it was based on the victim's age instead of the standard six years. It was thought that problems occasioned by a victim's young age, vagueness of memories, difficulties with communicating, explorations through therapy, and so on would be ameliorated by expanding the statute of limitation.

In the legislature's first expansion of the statute of limitation, the legislature made the limit the later of six years after the offense or the day before the victim's 21st birthday.[7] However, the legislature made this first expansion applicable only to "offenses occurring on or after the effective date,"[8] namely July 1, 1989. In later years, the legislature further expanded the statute of limitation for child sexual assault to the victim's age 26 (effective April 22, 1994); to age 31 (effective June 17, 1998); to age 45 (effective May 1, 2004); and, for certain allegations of first-degree sexual assault, to the victim's lifetime (effective April 20, 2006).[9] However, for each of these further expansions, the legislature did not limit the expansion to "offenses committed on or after the effective date" of the expansion. Instead, the legislature made these expansions retroactive, saying that they applied "to offenses not barred from prosecution on the effective date."[10] (See Figure 1.) In 2003, the Wisconsin Supreme Court concluded in *State v. Haines*[11]

that the legislature's 1994 retroactive expansion, and thus presumably all the legislature's other retroactive expansions effective after 1994, did not violate a defendant's constitutional rights, as long as the prior statute of limitation for the defendant's crimes was still running when the expansion became effective.[12]

The *MacArthur* Case

In January 2006, MacArthur was charged under chapter 944 of the 1965 Wisconsin Statutes. The six-year statute of limitation that was in effect from 1965 to 1972,[13] when the crimes were alleged to have been committed, would have expired by 1978 and thus prohibited prosecution of MacArthur. However, the state alleged that MacArthur ceased being a resident of Wisconsin in 1970, and, therefore, the tolling provision[14] kept the six-year statute of limitation from expiring. In response, MacArthur argued that, even if he was not a resident of Wisconsin, he still could not be prosecuted because the applicable statute of limitation was the one in effect in January 2006 (hereinafter victim-age-45 statute of limitation), when prosecution of him began. This statute of limitation says: "A prosecution for violation of s. 948.02 ... shall be commenced before the victim reaches the age of 45 years or be barred...."[15] Each of MacArthur's alleged victims was over age 45 in January 2006.

The circuit court rejected MacArthur's argument that the expanded statute of limitation, tied to the age of the victim, trumped the six-year statute of limitation and its tolling provision. MacArthur filed an interlocutory appeal with the court of appeals on the issue of whether the victim-age-45 statute of limitation applied to him.[16] The court of appeals accepted the appeal but certified the case to the supreme court.

Most of MacArthur's argument to the supreme court consisted of statutory interpretation. The supreme court followed the state's recommendation to interpret the expanded statute of limitation by its "plain language," and the court concluded that the victim-age-45 statute of limitation did not apply to MacArthur because he was not charged under Wis. Stat. chapter 948, which took effect July 1, 1989.

Alex Flynn, Marquette 1984, is the principal in Alex Flynn & Associates S.C., Milwaukee. He practices civil and criminal litigation in federal and state courts throughout Wisconsin. Visit him at **www.alexflynn.com.**

The supreme court said that all of the legislature's expansions of the statute of limitation were explicitly tied to violations of the present statute, chapter 948, not to any predecessor statutes prohibiting sexual assault of a child. MacArthur was charged with violating chapter 944 (1965-72) of the statutes, not with violating chapter 948. Another problem for Mac-Arthur's argument was the fact that the legislature had repealed chapter 944 in 1975,[17] when it created Wis. Stat. section 940.225 to include sex crimes against children.[18] MacArthur contended to the supreme court that the 1975 legislature showed by several of its actions that it did not really intend to repeal chapter 944 but instead intended to repeal, recreate, and renumber the chapter 944 violations as the new Wis. Stat. section 940.225. He also relied on the fact that later, in 1987, when the legislature repealed subsections of section 940.225 dealing with children and enacted the present chapter 948, the legislature explicitly said that the repealed subsections of section 940.225 were "transferred" to and "revised" in the new chapter 948.[19] Thus, MacArthur argued that a line could be traced joining the old chapter 944 crimes to the present chapter 948 crimes and, as a result, his alleged violation of chapter 944 was constructively a violation of the present chapter 948. Therefore, the recent expansions of the statute of limitation for violations of chapter 948 crimes applied to him and barred prosecution of him because his alleged victims were over age 45 in January 2006.

The Wisconsin Supreme Court disagreed and concluded that the reference to chapter 948 in the expanded statute of limitation must be interpreted literally, not constructively.[20] According to the court, when the expanded statute says "a prosecution for violation of s. 948...,"[21] it means only chapter 948. The statute's plain language does not encompass any predecessor statutes to chapter 948.[22] Therefore, MacArthur's prosecution could proceed because he was not charged under

chapter 948, and so the victim age limit in the expanded statute of limitation in section 939.74(2)(c) did not apply to him. Thus, the supreme court reached a conclusion that allowed the prosecution of MacArthur to continue.

But by allowing the prosecution to go forward, the *MacArthur* court might actually have defeated the will of the legislature regarding other past and future defendants also charged under old statutes. By focusing on the "plain language" of the statute, instead of the apparent legislative intent, the court's opinion did not consider the policy implications of its decision, namely that defendants charged with sexual assault of minors under predecessor statutes to chapter 948 could not be prosecuted under the expanded statute of limitation tied to chapter 948. Cognizant of the policy problem, Justice Ann Walsh Bradley wrote in a concurring opinion that, "I am concerned that in an effort to save this prosecution, the State (and thus the majority) is actually undermining the prosecution of other child sexual assault cases."[23] Justice Bradley then outlined the problems with the majority decision.[24]

In addition to Justice Bradley's concerns, the following should also be considered. Some child sexual assault defendants who were prosecuted under an expanded statute of limitation and are now serving time in prison should have their convictions reviewed and potentially vacated because the expanded statute of limitation in section 939.74(2)(c) was wrongly applied to them. Moreover, some as-yet-undetected child sexual assault defendants cannot be prosecuted under the present expanded statute of limitation.

Figure 1

Statutes of Limitation for Child Sexual Assault Defendants

Effective Dates	Criminalized & Punished under Wisconsin Statute	Statute of Limitation
Until 1975	Chapter 944	6 years (standard time)
Starting in 1975 to June 30, 1989	Section 940.225	6 years (standard time)
Starting July 1, 1989	Chapter 948	Later of 6 years after offense or day before victim's 21st birthday – applies only to "offenses occurring on or after the effective date" of July 1, 1989
April 22, 1994	Chapter 948	* Expanded to victim's age 26
June 17, 1998	Chapter 948	* Expanded to victim's age 31
May 1, 2004	Chapter 948	* Expanded to victim's age 45
April 20, 2006	Chapter 948	* Expanded to victim's lifetime (for certain offenses)

* Legislature made expansion retroactive, applies "to offenses not barred from prosecution on the effective date"

Because of the legislature's repeated expansions of the statute of limitation for child sexual assault, in recent years several defendants have been prosecuted for offenses that occurred many years ago, under the theory that prosecution was still possible if the victim was under the specified age limit in the expanded statute of limitation. However, since the supreme court decided in *MacArthur* that the expanded statute of limitation applies literally only to crimes charged under Wis. Stat. chapter 948, and not to crimes charged under predecessor sexual assault statutes, some of those defendants charged under predecessor statutes should not have been prosecuted. If a defendant was charged under a child sex assault statute number not in chapter 948, but the prosecution applied the expanded statute of limitation for chapter 948 crimes, that defendant was deprived of the protections of the proper statute of limitation for the crime. Any defendant who was accused of sexually assaulting a minor before July 1, 1989, who was a public resident of Wisconsin for a total of six years before prosecution commenced, but who was prosecuted under an expanded statute of limitation effective on or after July 1, 1989, might have his or her conviction vacated. Because such a defendant's crime did not come under the expanded statute of limitation, the standard six-year statute of limitation would have barred the defendant's prosecution because the time limit would have expired before the prosecution had begun.

For example, a fictional defendant charged in October 1994 with committing child sexual assault against an 8-year-old child in May 1988 would have been charged under Wis. Stat. section 940.225 because Wis. Stat. chapter 948 was not effective until July 1, 1989.[25] Thus, the statute of limitation applicable to that defendant would have been the six-year statute, and that six-year statute of limitation would have expired in May 1994. However, when the prosecution began in October 1994, the prosecutor knew that the legislature had recently expanded the statute of limitation to the victim's age 26 for child sexual assaults "not yet barred from prosecution."[26] If both the prosecutor and defense counsel assumed that the expanded, victim-age-26 statute of limitation applied to all sexual assaults of children, no matter what statute number was violated, that defendant would have been mistakenly charged in October 1994, even though the correctly applicable six-year statute of limitation had expired for him five months before prosecution was started. The supreme court's *MacArthur* decision makes it clear that this defendant could not be prosecuted after May 1994, because the legislature's expansion of the statute of limitation did not apply to him since the expansion applied only to crimes violating chapter 948. Convictions with similar fact patterns should be reviewed for their legitimacy.

The supreme court's decision in *MacArthur* also means that, in the future, some as-yet-undetected child sexual assault defendants may escape prosecution altogether, while other defendants may be prosecuted without any time limit. The difference depends on whether the alleged crime occurred before or after July 1, 1989. The fact that not all future defendants accused of sexual assault of minors will be treated the same was a concern Justice Bradley recognized in *MacArthur*.[27] Any defendant accused of committing a sex assault crime against a minor on or after July 1, 1989 will be charged with a chapter 948 crime. For a chapter 948 crime, the defendant will come under a victim-age-45 statute of limitation for second-degree sexual assault,[28] or, for certain charges of first-degree sexual assault, will come under a no- age-limit statute of limitation, which permits prosecution to be initiated at any time.[29] In contrast, defendants accused of committing sexual assault against a minor before July 1, 1989 will come under a six-year statute of limitation, subject only to the tolling provision. The following two fictional examples illustrate the different statutes of limitation for future child sexual assault defendants after *MacArthur*.

Example 1. Defendant A, a 17-year-old girl, had sexual contact on July 1, 1989 with a 14-year-old boy. The defendant came under the first legislative expansion of the statute of limitation, effective July 1, 1989, which allowed prosecution no later than the victim's age 21. On April 21, 1994, the effective date of the second legislative expansion,[30] the victim was not yet 21 years old. Thus, the statute of limitation was still running for Defendant A. The second expansion allowed prosecution to the victim's age 26 and retroactively applied the expansion to "offenses not barred from prosecution on the effective date."[31] Because Defendant A's offense was not yet barred from prosecution, since the victim was not yet 21, Defendant A came under the newly expanded statute and could be prosecuted to the victim's age 26.[32] In 1998, the legislature expanded the statute of limitation to the victim's age 31.[33] Again, in 2004, the legislature expanded it to the victim's age 45.[34] Defendant A's alleged victim was under 26 in 1994, under 31 in 1998, and under 45 in 2004. This means that Defendant A would be liable for prosecution until 2020, when the victim will be 45, for the July 1, 1989 crime of a 17-year-old girl having sexual contact with a 14-year-old boy. If the boy had been just a little younger, one day before his 13th birthday, when the crime occurred, the offense would be first-degree sexual assault. In that situation, starting in April 2006 when the legislature abolished the statute of limitation for first-degree sexual assault of a minor,[35] Defendant A could be prosecuted for the rest of the victim's life for the crime, even if Defendant A always remained a public resident of Wisconsin.

Example 2. However, the same rules do not apply to fictional Defendant B, a 35-year-old man who raped a 5-year-old girl on June 30, 1989. Wis. Stat. chapter 948 was not yet effective on June 30, 1989, and so none of the age-based expansions of the statute of limitation for chapter 948 crimes apply to Defendant B. If Defendant B was a Wisconsin resident for a total of six years between March 1989 and the present, the defendant cannot be prosecuted for the rape of the 5-year-old girl that occurred on June 30, 1989, even though there is presently no statute of limitation for prosecution for such a child sexual assault when it violates Wis. Stat. chapter 948, whose effective date was July 1, 1989.

Conclusion

The legislature cannot rectify the unequal application of the law in prosecuting defendants alleged to have committed child sexual assault. In spite of the almost boundless statute of limitation against such defendants in the present, there is no way to reach back and prosecute every person who has ever committed the crime of sexual assault against a child. Even if the legislature now changes the law so that the recent expansions of the statute of limitation for sex crimes against children apply both to violations of chapter 948 and to violations of the predecessor statutes of chapter 948 that prohibited sex crimes against children, namely chapter 944 and section 940.225, this would not create a net to keep current, wrongly-prosecuted defendants from seeking relief or to increase the number of defendants who could be prosecuted in the future. It would catch no more defendants than does the present tolling statute, which keeps the old six-year tolling statute running for defendants who have left the state.

The legislature cannot retroactively reverse a six-year statute of limitation that has already expired for a Wisconsin resident who has never been prosecuted, since *Haines* says that "once a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense."[36]

If the supreme court had accepted MacArthur's reasoning that chapter 948 constructively includes predecessor child sexual assault statutes, an 86-year-old man would have escaped prosecution for allegations that he had sexual contact with three minor girls between 1965 and 1972. After *MacArthur*, this man faced prosecution, but other defendants who have been convicted of sexual assault of minors may be able to have their convictions overturned and go free. Moreover, other persons not yet charged will be subject to different statutes of limitation, depending on whether the child sexual assault was committed before or after July 1, 1989.

Endnotes

1*State v. MacArthur*, 2008 WI 72, 310 Wis. 2d 550, 750 N.W.2d 910.

2The author acknowledges the contributions of attorneys Marjorie Reiley Maguire and Jamie F. Wiemer to the appeal of this case in the court of appeals and supreme court and to the writing of this article.

3*See* Wis. Stat. chapter 944, Laws Against Sexual Morality (1965-72). These are the years relevant to the *MacArthur* case.

4Chapter 184, Laws of 1975, § 5.

5The legislature enacted chapter 948, Crimes Against Children, in 1987 Wisconsin Act 332, § 55, and made the effective date July 1, 1989 in § 66a.

6*See* Wis. Stat. § 939.74 (1965-72 and 1975-89).

7The legislature created subsection (2)(c) of Wis. Stat. section 939.74, the statute of limitation, in 1987 Wisconsin Act 332, § 27.

81987 Wis. Act 332, § 65.

91993 Wis. Act 219, §§ 6, 7; 1997 Wis. Act 237, § 722c; 2003 Wis. Act 279, §§ 9, 10; 2005 Wis. Act 276, § 1.

101993 Wis. Act 219, § 7; 1997 Wis. Act 237, § 9356(2d); 2003 Wis. Act 279, § 10(2).

11*State v. Haines*, 2003 WI 39, 261 Wis. 2d 139, 661 N.W. 2d 72.

12*Id.* ¶ 2.

13Wis. Stat. § 939.74 (1965-72).

14Wis. Stat. § 939.74(3) (1965-72).

15Wis. Stat. § 939.74(2)(c) (2005-06).

16The appeal also concerned 1) what burden of proof the state had to meet to prove a defendant had ceased being a Wisconsin resident and thereby tolled a statute of limitation; and 2) whether the court or a jury should decide the tolling issue. This article, however, does not deal with these aspects of the appeal or the supreme court's decision. The supreme court relied on federal decisions and concluded that the court decides whether the state has met its burden, which is preponderance of the evidence, to show that the defendant ceased being a public resident of Wisconsin before the statute of limitation expired. The jury's involvement in the determination is limited to deciding the date or date range of the charged crime in its general verdict.

17Chapter 184, Laws of 1975, § 8.

18*Id.* § 5.

191987 Wis. Act 332, § 55.

20*MacArthur*, 2008 WI 72, ¶ 26, 310 Wis. 2d 550.

21Wis. Stat. § 939.74(2)(c).

22*MacArthur*, 2008 WI 72, ¶ 26, 310 Wis. 2d 550.

23*Id.* ¶ 57 (Bradley, J., concurring).

24*Id.* ¶¶ 58-64.

251987 Wis. Act 332, § 66a.

261993 Wis. Act 219, § 6, effective April 22, 1994.

27*MacArthur*, 2008 WI 72, ¶¶ 57-63, 310 Wis. 2d 550 (Bradley, J., concurring).

28Wis. Stat. § 939.74(2)(c).

29Wis. Stat. § 939.74(2)(a).

301993 Wis. Act 219, §§ 6, 7.

311993 Wis. Act 219, § 7.

321993 Wis. Act 219, § 6.

331997 Wis. Act. 237 § 722c.

342003 Wis. Act 279. § 9.

352005 Wis. Act 276, § 1.

36*Haines*, 2003 WI 39, ¶ 13, 261 Wis. 2d 139.

What is Living Constitutionalism?

By Jack Balkin at http://balkin.blogspot.com/

This past week I've written a couple of posts that offer an account of living constitutionalism, in which popular mobilization and partisan entrenchment in the judiciary play a major role in shaping constitutional change. This version of living constitutionalism is also a "democratic constitutionalism." (I borrow this term from my colleagues Robert Post and Reva Siegel). It is "living" constitutionalism is because judicial and non judicial interpretations change over time, and it is "democratic" because they change in response to sustained social and political mobilizations that, in turn alter constitutional culture. Last week Dahlia Litwick and Eric Posner offered their comments on this model, and today I offer a further elaboration.

Eric goes right to the heart of the matter when he asks why we should have a system of constitutional interpretation that reflects changes in popular opinion produced by long term popular mobilizations. He asks: If constitutional change responds to political mobilizations, social movement activism, presidential appointments strategies, and shifts in popular opinion, what is the purpose of having constitutional courts in the first place? Why not just get courts out of the business of holding anything unconstitutional and exercise judicial restraint in almost every case? Why not just have a purely majoritarian democracy?

To answer this question, let's take a look at Eric's account of the system I described. First, Eric says, the effect of partisan entrenchment is "conservative (in the temporal sense)" because Justices reflect the views of political coalitions that put them in office when they were appointed. (And that means, on a multimember court, that a variety of different positions, strewn across time, are represented.) Partisan entrenchment in the judiciary may prevent drastic changes in governance, or as Eric puts it, it may promote "smooth policy variance over time." Second, the system I've described "enhances the degree of supermajoritarianism that already exists in our heavily supermajoritarian system" because laws not only have to pass Congress and the President (or the state legislature and the Governor) but also the scrutiny of a court whose members were appointed by people at different times with very different political views. Third, this process "produces a heavy orientation toward maintaining the status quo, and will cause problems in particular when public opinion changes more rapidly than the average justice's term." Put somewhat differently, if the vector sum of political forces changes swiftly on a constitutional issue, the courts will tend hold back and resist the views of the day until the change in constitutional culture proves lasting, because it will take time for new judges to replace older ones. (There is an additional point that Eric did not mention: because the federal courts are appointed by the national political process, they will tend to keep regional majorities close to the views of the national political coalition. That is to say, they are not so much counter-majoritarian as nationalist.)

It's worth noting what Eric has just described (and what he largely objects to): He is describing basic features of constitutionalism generally. Constitutionalism channels and disciplines present day majorities through supermajoritarian rules that they cannot easily change overnight (but can change eventually); this prevents drastic changes in governance and keeps temporary majorities from altering or subverting the constitutional values of more temporally extended supermajorities. In essence, what Eric finds inefficient and unnecessary is constitutionalism that interferes with simple majoritarianism, which is to say, he is opposed to most forms of constitutionalism. Most forms, but not all, because in other work Eric has offered an important exception to his generally skeptical approach: he wants constitutions to restrain democratic decisionmaking that undermines what he calls "political competition," that is laws and practices that interfere with the ability of different political elites and political parties to compete for voters, but not any other rights. Indeed, as long as we effectively protect political competition by other means, we don't really need constitutional rights guarantees at all.

Understood in this way, Eric is not objecting to my account of living constitutionalism because it is politically responsive. He is objecting to it because it is constitutionalism, i.e., because it restrains majorities, because it is not politically responsive enough. His concerns are quite different from Dahlia's. Dahlia wants to make sure that courts are not simply on a frolic and detour, and that they aren't simply mouthpieces for the views of contemporary majorities. That is to say, Dahlia's problem is the opposite of Eric's. She likes constitutionalism (and judicial review) just fine. She's not an originalist by any means, but she likes the rule of law values that originalism promises (even if it can't always deliver).

The version of living constitutionalism I've sketched out in my previous posts sits squarely between the two of them, and that is why they are objecting to it, albeit from opposite directions. Dahlia thinks there's too much democratic politics in my account, and not enough legal restraint. Eric thinks its an inefficient way to do democratic politics.

In general, living constitutionalism of the sort I've described allows social and political mobilizations, working over long periods of time, to shift the interpretation and application of abstract clauses and open ended features of the Constitution. But for the most part it has not altered the "hard wired" features of the Constitutional text. (To the extent the latter has happened, it is really quite exceptional, and, I think, quite wrong). This approach is faithful to the Constitution's original meaning but not necessarily the original expected application of the text. Long term changes in constitutional culture can move us from Plessy v. Ferguson to Brown v. Board of Education, but they won't allow a 34 year old President, or three Houses of Congress, or a simple majority of one House to overturn a Presidential veto. While Article V amendment is necessary for changing these hardwired features of the Constitution, the interpretation, implementation, and application of vague and abstract clauses like "equal protection" can and does change through sustained political mobilization.

To me it is not at all surprising that fights between so called originalist and living constitutionalist approaches almost never concern the hard wired features of the Constitution; they almost always concern the Constitution's abstract guarantees and its silences. Most living constitutionalists assume that the hard wired features of the Constitution are binding even though they were created a long time ago. That is to say, they do not object to the dead hand of the past with respect to those features; their concern is primarily the construction and interpretation of those clauses and features that use the language of general principles and standards. They argue that we are not bound by how the generation of 1791 or 1868 would have applied the text. I think they are right about that. It is our job to interpret the text in our own time.

Under this model of living constitutionalism, successive generations may not reject the Constitution's text and principles, but they may decide how best to honor, implement, and apply them through constitutional constructions and doctrinal implementations. We can reject Plessy v. Ferguson, which is simply one generation's attempt at implementing the Constitution, but not the words of the equal protection clause.

This model produces a system of judicial interpretation that is responsive to democratic politics in the long run but not directly controlled by it in the short run. It preserves constitutional law's relative autonomy from politics in the short run while making it responsive to constitutional politics in the long run.

It also involves a system of judicial review but not a system of judicial supremacy. This distinction is crucial: Courts act as a stabilizing force, and hold officials (and especially executive officials) accountable to law, but they never have the last word. The purpose of judicial review in this model is to represent and protect (in as legally principled a way as possible) the constitutional values of temporally extended majorities, and to prevent quick and drastic changes in those constitutional values unless there has been extended and sustained support for change that is reflected in long term changes in constitutional culture.

Moreover, in this model judges do not have to do anything special or out of the ordinary to participate in the process of living constitutionalism. They don't have to be politicians or moral theorists or divinities like Dworkin's Hercules or philosopher kings. They don't have to be smarter, or wiser, or more moral or more farsighted than anyone else. All they have to do, once they get appointed, is to try to decide the cases according to law, in the best way they can. If they just go about doing their jobs, they will, in spite of themselves, participate in the gradual translation of changing constitutional politics into constitutional law. Meanwhile the job of people like me, and Dahlia, and Eric, and everyone else, is to criticize how they interpret the law and to try to persuade other people, and them, that our interpretations of the Constitution are the best ones and that they should agree with us.

As many of you know, I regard myself as both an originalist and a living constitutionalist. For me originalism requires fidelity to original meaning of the text and the principles that underlie the text, but not fidelity to the original expected application. So the model of living constitutionalism I've described here is largely consistent with my originalist views

about constitutional interpretation. Lest I be misunderstood, this does not mean that I agree with every decision the Court has every offered on the merits– for I do not– but that the broad outlines of change in American constitutional history are consistent with this general approach to interpretation, even if I think that many cases were wrongly decided. (Indeed, I regard this as a strength of my approach: it can make sense of what our nation has actually done in practice and what our constitutional traditional actually has produced.). I argue that the implementation and application of vague and abstract clauses is not fixed by what the adopting generation expected, but rather can change over time in response to long term changes in public opinion and sustained mobilizations in democratic politics.

You can now see the answer to the question that Eric and Dahlia posed: Why do we have judicial review at all if it is subject to democratic forces in the long term? Why is a flexible constitutionalism in which the interpretation of abstract clauses (but not the hard wired features) can change slowly over time better than a system of pure majoritarianism without constitutional constraints? The answer is that this variety of living constitutionalism still provides the valuable goods of constitutionalism, but in a way at once more flexible and, I would argue, more admirable than, say, Justice Scalia's model of originalism, which ties original meaning closely to original expected application. It is more admirable because it can make sense of the great achievements of American constitutionalism during the past two centuries that Scalia's model must treat as mistakes, mistakes that we retain only because people have come to rely on them. In my account of living constitutionalism, the reason why the Court protects women from sex discrimination is because of a sustained social movement for women's rights that changed people's views about what equality and equal protection required. In Scalia's model the Court protects women's rights today because activist judges wrongfully imposed their idiosyncratic values into the Constitution and now it's too late to change this dreadful mistake.

My account of living constitutionalism maintains the benefits of constitutionalism generally while allowing adjustments in interpretation over time in the face of sustained democratic mobilization. This makes it superior to Scalia's version of originalism, which he must continually leaven with exceptions for all those "mistakes," It also makes it superior to Eric's preference for pure majoritarianism, which loses out on the benefits of having a constitutional system that guarantees basic rights and limits on government. And it makes the most sense of our system of judicial review, which is not (and never has been) a system of judicial supremacy.

Dahlia reprinted a very interesting e-mail by Richard Shragger of U. Va., who argues that my account of living constitutionalism is too externalist and descriptive. This is an important criticism, which I will discuss in my next post on this topic.

But let me leave you with this point, which I will also develop in my next post. I think that people misunderstand what a theory of living constitutionalism has to do in order to be successful. Most people assume that living constitutionalism is a theory about how to interpret the Constitution in a particular case; it is a sort of mirror image to what they

think originalism is. In their view originalism is a theory directed to judges about what judges have to do to be faithful to the Constitution. Therefore living constitutionalism must be the same kind of theory. It must also be directed to judges and it must explain to judges how to decide particular cases. That is why Justice Scalia regularly makes fun of living constitutionalism. As he likes to say, it takes a theory to beat a theory, and living constitutionalism doesn't have one.

I think this is incorrect. Living constitutionalism is primarily a theory about what makes the process that produces changing interpretations of the Constitution legitimate. It is not primarily a theory that offers advice to judges about how to decide particular cases, for the general sort of advice it offers– keep up with the times, and adapt to changing conditions– is probably unnecessary in any event. More about this point in my next post.

What Is Living Constitutionalism?, Part II

JB

In the last set of posts, I've been explaining my views about living constitutionalism. I've argued that living constitutionalism is a process of change through which constitutional doctrine responds to social and political mobilizations and long term changes in popular opinion about what the Constitution means.

Richard Schragger objects that my account is merely descriptive and external– it is simply "a description of how political/historical forces shape courts and other institutions of government." This can't be living constitutionalism because it doesn't answer the question of "What does the Constitution require?" and the question "whether the Court is actually engaged in making law." Schragger wants what he calls an internal account, an account that argues that "that the Constitution is law, that law has content, and that legal doctrine has to be justified by an actual theory or account of the Constitution, the rights it contains, and how those rights apply through time."

I agree with Richard that a theory of living constitutionalism must be both normative and internal. I disagree with his assumption that my account is merely descriptive or purely external.

Individuals and Systems

We can talk about our constitutional system descriptively-- how it works-- or normatively-- for example, how it must work to be democratically legitimate.

Second, we can talk about it from the perspective of an outside observer who does not participate in it, or from the perspective of a participant invested in the future of the system who regards its directives as binding on him or her. And within the class of participants, we can look at it from the perspective of a judge, a legal official, or a citizen.

Third, and most important, we can focus our normative judgments on how the system operates as a whole or on what individuals in a system should do within the system. Sometimes we focus on individual behavior, but sometimes we think the proper focus is on the system of the design as a whole. Suppose for example, that we want to design an efficient market. We ask how its design and incentives produce certain types of results, and if it does not, we redesign the market and shape the incentives. We do not spend very much time giving advice to people in the market about how to behave so as to produce efficiency; rather we assume that efficiency arises from the sum of their interactions, and not from each of them following our advice about how to behave. In fact, it may be a mistake to focus primarily on advising individual people about how to behave in the market, although educating people about costs and benefits, might be a good idea; so too much be educational campaigns to shape people's values and preferences. Another example of a focus on systems is our Constitution's separation of powers. It tries to preserve republican government by balancing contrasting interests, under the assumption, as Madison put it, that enlightened statesmen (the sort who would respond to good advice) will not always be at the helm.

When Richard says that my discussion is not "internal," what I think he really means is that I am not giving advice to judges about how to decide cases so that the constitutional system as a whole is legitimate. He is right about that. I don't think that's the most important point of focus in understanding the legitimacy of constitutional change. I will have something to say about this later on, but I do not think that giving advice to judges is the primary goal of a theory of living constitutionalism.

The more fruitful normative question is not what specific interpretive theory judges should adopt to ensure legitimacy, but whether the system of constitutional change the country has developed over time is legitimate. That is, is the system of constitutional decisionmaking legitimate taken as a whole? Does it serve the larger purposes of constitutionalism, democracy, and the rule of law?

"Living constitutionalism" cannot be simply a theory of how individual judges should decide cases– although obviously people can offer that sort of advice as well. It must be an account of why changes in constitutional doctrine over time– which largely occur outside of Article V amendment and are not in the control of any single person, much less any single judge– are legitimate. It has to be an account of why these changes can simultaneously serve rule of law and democratic values.

Advice to Judges or Theory of Legitimacy?

As I noted previously, I think people misunderstand what a theory of living constitutionalism has to do in order to be successful. They think it has to be a theory that

tells judges-- "here's how to decide cases that come before you. Do this and don't do that."

Why do people think this? Possibly it is because they think that originalism is just such a theory, and so they assume that living constitutionalism must be its mirror opposite. They are wrong about living constitutionalism. They are also wrong about originalism.

Originalism offers advice to judges about how to decide cases because it is also a theory of what makes the constitutional system (and the institution of judicial review) legitimate. It argues that fidelity to the Constitution is necessary for democratic legitimacy. There are several theories for why that is so, but perhaps the most familiar version is that the Constitution was created through an act of popular sovereignty and therefore we must preserve the meaning of the Constitution over time in order to preserve the legitimacy of the original act. Hence judges must adhere to original meaning. If they do so, then they will do their part to maintain the system's legitimacy.

This theory closely connects what makes the constitutional system legitimate with advice to individual judges about how to decide particular cases. But living constitutionalism may not work the same way. It concerns how the system as a whole works over long periods of time: why the cumulative processes that produce changing interpretations of the Constituition over time are legitimate. It may not be advice directed to individual judges, or, if it is, it must be far more than that.

That's what I'm trying to explain. My approach is thoroughly normative, and it is also internalist, because I offer it from the perspective of someone in the system who wants to know what makes the system legitimate to them and to their fellow citizens.

Why do I emphasize focusing on how the constitutional system actually changes? The answer is simple: Ought implies can. We cannot expect actors to do what is not possible for them to do. That means that a causal account of the system is necessary precursor to any normative accouut of constitutional legitimacy. Sadly, much normative constitutional theory seems to ignore this crucial question. It assumes that if we just give judges the correct advice, and they follow this advice, the system as a whole will produce legitimate results. It does not stop to ask whether anyone could or would actually take the advice being offered or if individuals took it, whether the constitutional system as a whole would respond in the right way.

The work of a multimember court is not going to correspond to any coherent theory of advice directed at one individual. The cases will go all over the place: they will not correspond to any consistent methodology.

This does not mean that normative criticisms of judges and their decisions are useless or irrelevant to constitutional legitimacy. My point is that arguments about good judging and correct constitutional interpretation aren't external to the system of constitutional change. They are part of the process through which change occurs. The clash of opposed views about what the Constitution means and the clash of opposed positions about the

authority of different actors in the system drives the system forward. When people argue with each other and try to persuade each other, they are helping to shape the constitutional culture in which citizens live and in which judges hear and decide cases. When lawyers argue before courts, they are trying to persuade judges to rule their way. Not only is normative argument about the Constitution not futile, it is a central element of what makes a living Constitution live. Arguments about what the Constitution means and who has the authority to say what it means are crucial because they persuade the actors in the system to think differently. This produces new judicial appointments and can shape the views of judges who are already on the bench. Normative arguments about what the Constitution means occur in mobilization, in political campaigns, in debates about judicial selection, and in litigation campaigns. They are the stuff of constitutional culture and the drivers of constitutional change.

"Keeping up with the Times"?

Understood as an account of the processes of constitutional decisionmaking, living constitutionalism makes a great deal of sense. It also has the advantage of making sense of the actual history of our nation. However, understood as a doctrine for correct judging, "living constitutionalism" is an undertheorized concept. The claim that the Constitution must "keep up with the times" and "reflect changing values" is substantively empty unless you give an account of how and why it does these things and how doing so maintains its legitimacy. After all, there are many possible ways that one can "keep up with the times" and "reflect changing values."

Aiming this injunction at individual judges is largely misdirected. If you say that individual judges have a duty to "keep up with the times" or "reflect changing values" you haven't really said much. And to me, at least, it is by no means clear why individual judges have any such obligation or responsibility to "keep up with the times" or "reflect changing values" instead of doing what they are supposed to do, which is interpreting and applying the law the best they see it. And even if judges had such a responsibility, whose interpretation of "changing times" and whose version of "changing values" should they look to? To my interpretation or to yours? Should they look to the values of contemporary liberals or contemporary conservatives, because, I assure you, both sets of values are constantly changing, and both of them are doing their very best to keep up with the times. You can "keep up with the times" as a liberal or as a conservative, as a secular person or as a religious person, as a technophile or as a technophobe. You just do so in different ways. You can respond to changing times by changing your values, or you can respond to changing times by maintaining your values in the face of trials. The latter is what civil libertarians argue for all the time, and there are many living constitutionalists among their number.

Instead, a theory of living constitutionalism must explain why certain features of the Constitution may change while others must remain the same. And it must explain why those features that change do so in a way that preserves the values of constitutionalism, the rule of law, and democratic authority. To do this you need both normative and descriptive accounts of law and politics, because you first have to understand how the

system changes. To be a living constitutionalist, you have to understand why the Constitution lives, not just advise it to shape up and live right.

Do Judges Do Law or Politics?

Schragger objects that my account "doesn't answer the question of whether the Court is actually engaged in making law." I disagree. It should be obvious from my account that the Court makes law all the time. Courts must think and act and in terms of legal forms and practices; they must make legal arguments and write legal opinions. Their job is not to do politics, but to do law. Nothing in what I have said suggests that judges should do anything but make law. They should be faithful to text and principle, and use the various modalities of argument-- text, structure, history, precedent, prudence, and ethos-- to decide the cases before them. They will disagree among themselves, often heatedly, but that by itself does not make the process of change illegitimate. Rather, this process of disagreement about the law over time– and the mutual recognition of opposing positions– is crucial to the legitimacy of change in the constitutional system.

Through doing law (not politics), successive generations of judges, working in tandem (and in opposition with each other), inevitably translate changes in constitutional politics into constitutional law. They do so because new judges replace older ones, and because the judges who hear cases and decide them are influenced and shaped by the constitutional culture that they live in. This culture includes not only professional norms of what is "off the wall" and "on the wall legally," but also popular notions of constitutional values which influence professional judgements. That is, living constitutionalism is an account of a process for producing change that preserves legitimacy in a democratic society and allows judges to continue being judges.

A theory of living constitutionalism can't just be a theory of the content of the Constitution because, if it is truly living, that content will change over time. And it can't be just a theory of how individual judges should behave, because in a multimember body whose members are appointed at different times and under different circumstances, the work product of judges may keep within the mainstream of legal culture, but it will probably not match any consistent academic theory of good judging. Rather, living constitutionalism is a successful theory if it shows how systemic change occurs in a way that preserves rule of law values, maintains the benefits of constitutional government, and is roughly responsive to democratic politics.

It is no accident, I think that public opinion polls repeatedly show higher confidence for the Supreme Court than for the other two branches of government, even as people regularly hurl attacks at the Court for particular decisions. Americans want their Supreme Court and the lower federal courts to do two things: to act like courts, who decide cases according to law, and to be responsive to larger trends in public values. By and large the federal courts do this, and that is the long term source of their legitimacy in the eyes of the public.

The Importance of Constitutional Dissent

One consequence of my account is that some individuals within the constitutional system will not always like what judges do, because the system will produce constitutional changes that they do not agree with. People, and especially liberals, often associate "living constitutionalism" instinctively with whatever is progressive, but I think that is incorrect. A constitution that grows and changes in response to social and political mobilizations is as likely to move to the right as to the left. Indeed, it has moved in many different directions in our nation's history.

The conservative dominance of the last forty years is an example of the process of living constitutionalism at work, even though many of its proponents have fought under the banner of originalism. There is no contradiction here. Appeals to the values of the framers or founders are a pretty standard way that people call for a restoration to proper principles. That is to say, appeals to origins are a pretty standard way that people justify constitutional change outside of Article V (and change within it too). I think it was Quentin Skinner who once said (or perhaps he was quoting someone else) that every revolution sends its troops marching backwards into battle. That is, they use the tropes of return and restoration to promote what is actually change. The conservative originalism of the past several decades has been an attempt to replace a more liberal constitutionalism with a more conservative one. In many ways it has succeeded. That is also an example of the processes of a living constitution, although not one many liberals like.

But, you might respond, suppose that I am a liberal and these forces have produced constitutional doctrines with which I disagree. Why should I recognize the legitimacy of this process? You should recognize it because it is the same process by which liberal constitutionalism made its contributions to our constitutional tradition. This is the point I made in my discussion with Dahlia. She doesn't like what she thinks the Heller Court is going to do. She is not in all that different a position than critics of the Warren Court.

I don't like some of the decisions of the courts. I think that some cases like United States Morrison (which struck down the Violence Against Women Act) are bad law. There are others that I really despise. But I must accept them as law while working to change them over time through processes of legal persuasion in the courts and political mobilization outside the courts. I can argue that these decisions are bad interpretations of the law, and work to distinguish them or overrule them, just as people who disagree with me can work to limit or overturn decisions that they do not like, such as Roe v. Wade or Lawrence v. Texas. Faced with a deeply unjust decision, Dred Scott v. Sanford, Abraham Lincoln once said that Dred Scott was law, and should be respected until it is altered or overturned, but "we mean to do what we can to have the Court decide the other way." Here Lincoln articulated the basic premise of a living Constitution as a process. The Supreme Court's decisions deserve respect as positive law, but not respect as proper interpretations of the Constitution, unless, in fact, they are the right interpretations. People can and should work to overturn decisions that are false to the Constitution's spirit, and to its text and its principles, through political mobilizations, through the appointments process and through legal arguments directed at judges and legal officials.

Liberal and Conservative Living Constitutionalism

Liberals like myself must recognize that in a conservative era, the positive constitutional law of a living Constitution will become more conservative. That is also how the Constitution "keeps up with the times" and "reflects changing values." I must accept these decisions as law, but I need not accept them as correct. Living constitutionalism means that I can always dissent during "dark times" when my views are in the minority. I can try to persuade other people that my views are correct and work for the restoration or the redemption of constitutional values. Through this agonistic process of mobilizations and countermobilizations of groups seeking the restoration and redemption of Constitutional values the Constitution maintains its public acceptability. As my colleague Reva Siegel has pointed out, both sides must appeal to common values and common political goods in order to persuade the public that their views are correct. In the process, they acknowledge and incorporate aspects of each others' views. Contemporary liberal claims about the Constitution have been shaped by the conservative constitutional culture of our era, just as today's conservative constitutionalism reacted to and absorbed important features of the more liberal constitutional culture that preceded it.

What I have said will sound strange to many people, including many liberals, who have worked on the assumption that a theory of living constitutionalism must have two basic features: First, it must look like a mirror image of what they imagine originalism to be: a theory that offers advice to judges about how to do their jobs correctly and decide individual cases. (In fact, as noted above, originalism is also a theory of the legitimacy of the political system.) Second, it must lead to generally progressive results. I think neither assumption is correct. There are versions of living constitutionalism that offer substantive advice about how to decide cases, like John Hart Ely's process protection theory, or Ronald Dworkin's moral reading of the Constitution, or Stephen Breyer's theory of active liberty, or heck, even my own theory of text and principle. But a theory of living constitutionalism needs more. It needs a theory of legitimate change in a system that is ultimately not controlled by individual judges but by the interaction of different parts of the political system. It is, if you will, a structural argument about the nature of the constitutional system. And what could be more internalist than a good old fashioned structural argument?

To those who know something of my earlier work, these conclusions will not be all that surprising. Previously I argued that original meaning originalism, correctly understood, is not necessarily conservative in its implications. Now I'm arguing that living constitutionalism, correctly understood, is not necessarily progressive either. A lot of theories experience ideological drift; it's my job to show you how the river runs.

From: Roades, Jennifer - GOV
To: Hagedorn, Brian K - GOV
Subject: Judicial Interview

Interview time of 10:15 am.

From: Roades, Jennifer - GOV
To: Hizmi, Elizabeth - GOV; Brian Hagedorn
Subject: RE: INTERVIEW
Date: Monday, June 29, 2015 9:32:00 AM

Elizabeth,

Thank you for the information on the interview. Brian will be there at 10:15 a.m.

Sincerely,

Jennifer Roades
Legal Assistant
Office of Governor Scott Walker
jennifer.roades@wisconsin.gov
(608) 266-1212

From: Hizmi, Elizabeth - GOV
Sent: Friday, June 26, 2015 4:36 PM
To: bkhagedorn@gmail.com
Cc: Roades, Jennifer - GOV
Subject: INTERVIEW
Importance: High

Dear Brian,

The Governor's Judicial Selection Advisory Committee has reviewed and considered all applications for the Wisconsin Court of Appeals – District II vacancy. JSAC has recommended moving you forward in the appointment process. The next step in the process will be an in-person interview. Please see below regarding details confirming your interview time. In preparation for the interview, please review the 3 articles found attached. Please let me know if you have any issues with accessing the attachments.

DATE: Wednesday, July 1st
TIME: 10:15a.m.
LOCATION: Quarles & Brady, 33 East Main Street, Suite 900, Madison, WI 53703

Please note, at this time, we kindly request you to please keep your status in the process confidential.

All the best,

Elizabeth Hizmi / Director of Gubernatorial Appointments

Office of Governor Scott Walker / (608) 266-1212

elizabeth.hizmi@wisconsin.gov

From: Hizmi, Elizabeth - GOV
To: Brian Hagedorn
Cc: Roades, Jennifer - GOV
Subject: INTERVIEW II
Date: Thursday, July 02, 2015 1:32:00 PM
Importance: High

Dear Brian,

The panel that conducted in-person interviews on July 1st has recommended moving you forward in the appointment process for the Wisconsin Court of Appeals – District II vacancy. The next step in the process is an in-person interview with Governor Walker. Below you will find information confirming your interview time and location:

DATE: Wednesday, July 8th
TIME: 8:40a.m.
LOCATION: Office of the Governor, 115 E, State Capitol

All the best,

Elizabeth Hizmi / Director of Gubernatorial Appointments

Office of Governor Scott Walker / (608) 266-1212

elizabeth.hizmi@wisconsin.gov

From: Hizmi, Elizabeth - GOV
To: Brian Hagedorn
Subject: Background
Date: Monday, July 13, 2015 10:19:00 AM
Attachments: Governor Appointee Background Form.doc
Importance: High

Dear Brian,

Attached, you will find the Wisconsin Department of Justice background disclosure form. At your earliest convenience, please return the signed, completed document to my attention.

Thank you kindly,

Elizabeth Hizmi / Director of Gubernatorial Appointments

Office of Governor Scott Walker / (608) 266-1212

elizabeth.hizmi@wisconsin.gov

WISCONSIN DEPARTMENT OF JUSTICE
BACKGROUND DISCLOSURE FORM

Position Under Consideration:	
Governor's Office Contact: *Elizabeth Hizmi*	

Applicant Name (Last, First, Middle)		Sex/Race	
Maiden/Alias/Former Names		Date of Birth	
Social Security Number	Driver License Number	DL State	DL Expires
Home Phone	Cell Phone		

List all residences where you have lived for the preceding 10 years, beginning with your present address

Beginning / End Dates	Street Address	City	State

Internal Use Only

☐ WI Drivers License	☐ No Record	☐ Record Attached
☐ NCIC/CIB Wanted Missing	☐ No Record	☐ Record Attached
☐ CIB Criminal History	☐ No Record	☐ Record Attached
☐ NCIC/III Criminal History	☐ No Record	☐ Record Attached
☐ CCAP Criminal History	☐ No Record	☐ Record Attached
☐ Out-of-State Driver License	☐ No Record	☐ Record Attached
☐ Out-of-State Criminal History	☐ No Record	☐ Record Attached
☐ Credit History Check		☐ Record Attached
☐ Taxes Reviewed		☐ Summary

Background Record Check Completed By: Date:

CRIMINAL RECORDS

Have you ever been convicted or are any charges pending against you for any criminal violations, including traffic citations but not parking tickets?

☐ Yes ☐ No

Date:	Name & Location of Court:
Charge:	Disposition/Outcome:
Details of the Incident:	

Date:	Name & Location of Court:
Charge:	Disposition/Outcome:
Details of the Incident:	

Date:	Name & Location of Court:
Charge:	Disposition/Outcome:
Details of the Incident:	

EDUCATION

HIGH SCHOOL

High School Name:	Dates Attended:
Address:	Phone:

COLLEGE / UNIVERSITY

Institution Name:	Dates Attended:
Address:	Phone:
Course of Study:	Degree(s) Attained:
Name used if different:	

Institution Name:	Dates Attended:
Address:	Phone:
Course of Study:	Degree(s) Attained:
Name used if different:	

COLLEGE / UNIVERSITY Continued

Institution Name:	Dates Attended:
Address:	Phone:
Course of Study:	Degree(s) Attained:
Name used if different:	

Institution Name:	Dates Attended:
Address:	Phone:
Course of Study:	Degree(s) Attained:
Name used if different:	

EMPLOYMENT HISTORY

List all places of employment for last 15 years

Place of Employment: (No abbreviations)	Dates Employed:
Address:	Phone:
Position Held:	Reason for Leaving:

Place of Employment: (No abbreviations)	Dates Employed:
Address:	Phone:
Position Held:	Reason for Leaving:

Place of Employment: (No abbreviations)	Dates Employed:
Address:	Phone:
Position Held:	Reason for Leaving:

Place of Employment: (No abbreviations)	Dates Employed:
Address:	Phone:
Position Held:	Reason for Leaving:

EMPLOYMENT Continued

Place of Employment: (No abbreviations)	Dates Employed:
Address:	Phone:
Position Held:	Reason for Leaving:

Place of Employment: (No abbreviations)	Dates Employed:
Address:	Phone:
Position Held:	Reason for Leaving:

Place of Employment: (No abbreviations)	Dates Employed:
Address:	Phone:
Position Held:	Reason for Leaving:

BUSINESS OWNERSHIP / PARTNERSHIP LISTINGS

List all businesses or partnerships that you or your spouse or partner has been involved in:

Business or Partnership Name / City / State:	Was The Business Incorporated, obtain an LLC or other status :
Dates of Involvement:	Presently Listed as Corporate, Partnership or LLC Officer?

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Dates of Involvement:	Presently Listed as Corporate, Partnership or LLC Officer?

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Dates of Involvement:	Presently Listed as Corporate, Partnership or LLC Officer?

Business or Partnership Name / City / State:	Was The Business Incorporated, obtain an LLC or other status :
Dates of Involvement:	Presently Listed as Corporate, Partnership or LLC Officer?

STATEMENT OF UNDERSTANDING AND AFFIRMATION

I hereby state that all of the information provided in this document is true and complete to the best of my knowledge and belief. I understand that any falsification or omission of information may disqualify me from consideration of any position. By signing this form, I authorize the Wisconsin Department of Justice, Division of Criminal Investigation, to conduct a background investigation and verify the information provided above.

_____ _____

Signature of Person Under Consideration Date

BLANKET AUTHORIZATION FOR RELEASE OF INFORMATION:

I hereby authorize the Wisconsin Department of Justice, Division of Criminal Investigation to obtain information and records pertaining to me from any or all of the following sources:

1. Present employer
2. Any previous employers
3. Any school, college, university or other educational institution
4. Credit bureaus
5. Banking or other financial institutions
6. Any place of business (for purposes of obtaining credit or employment data)
7. Military records centers
8. Any governmental agency or political subdivision
9. Wisconsin Department of Revenue

Exceptions to this blanket authorization:

1.

2.

3.

_____

Print Full Name of Person Under Consideration

_____ _____

Signature of Person Under Consideration Date

_____ _____

Witness and/or Notary Public Date

WISCONSIN DEPARTMENT OF JUSTICE
BACKGROUND DISCLOSURE FORM

Position Under Consideration: Brian Hagedorn
Governor's Office Contact: *Elizabeth Hizmi*

Applicant Name (Last, First, Middle) Hagedorn, Brian Keith		Sex/Race Male	
Maiden/Alias/Former Names		Date of Birth [redacted]1978	
Social Security Number [redacted]	Driver License Number [redacted]	DL State WI	DL Expires [redacted]
Home Phone None	Cell Phone [redacted]		

List all residences where you have lived for the preceding 10 years, beginning with your present address

Beginning / End Dates	Street Address	City	State
July 2010-present	11 Prentice Place	Madison	WI
Sept. 2006-July 2010	9511 67th St.	Kenosha	WI
March 2005-Sept. 2006	5223 11th Avenue	Kenosha	WI

Internal Use Only

☐ WI Drivers License	☐ No Record	☐ Record Attached
☐ NCIC/CIB Wanted Missing	☐ No Record	☐ Record Attached
☐ CIB Criminal History	☐ No Record	☐ Record Attached
☐ NCIC/III Criminal History	☐ No Record	☐ Record Attached
☐ CCAP Criminal History	☐ No Record	☐ Record Attached
☐ Out-of-State Driver License	☐ No Record	☐ Record Attached
☐ Out-of-State Criminal History	☐ No Record	☐ Record Attached
☐ Credit History Check		☐ Record Attached
☐ Taxes Reviewed		☐ Summary

Background Record Check Completed By:

Date:

CRIMINAL RECORDS

Have you ever been convicted or are any charges pending against you for any criminal violations, including traffic citations but not parking tickets?

☒ Yes ☐ No

Date: Approx. June 2014?	Name & Location of Court: McFarland, WI
Charge: Speeding	Disposition/Outcome: Paid fine
Details of the Incident: I was going 15 mph (I believe) over the speed limit	

Date: Early 2010	Name & Location of Court: Kenosha, WI
Charge: Speeding	Disposition/Outcome: Paid fine
Details of the Incident: I was going 15-20 mph over the speed limit	

Date: Approx. 1994	Name & Location of Court: Wauwatosa WI
Charge: Speeding	Disposition/Outcome: Probation; paid fine
Details of the Incident: I was going 30 mph over the speed limit. I received probation, which I completed successfully, and paid the fine	

EDUCATION

HIGH SCHOOL

High School Name: Wauwatosa West High School	Dates Attended: 1992-1996
Address: 11400 W. Center St., Wauwatosa, WI	Phone: 414-773-3000

COLLEGE / UNIVERSITY

Institution Name: Trinity International University	Dates Attended: 1996-2000
Address: 2065 Half Day Road, Deerfield, IL	Phone: 847-945-8800
Course of Study: Philosophy	Degree(s) Attained: B.A.
Name used if different:	

Institution Name: Northwestern University School of Law	Dates Attended: 2003-2006
Address: 300 E. Superior St., Chicago, IL	Phone: 312-503-2296
Course of Study: Law	Degree(s) Attained: J.D.

Name used if different:

EMPLOYMENT HISTORY

List all places of employment for last 15 years

Place of Employment: (No abbreviations)	Dates Employed:
Office of the Governor	January 2011-present
Address:	Phone:
115 East State Capitol, Madison, WI	608-266-1212
Position Held:	Reason for Leaving:
Chief Legal Counsel	n/a

Place of Employment: (No abbreviations)	Dates Employed:
Wisconsin Department of Justice	August 2010-January 2011
Address:	Phone:
17 Est Main Street, Madison, WI	608-266-1221
Position Held:	Reason for Leaving:
Assistant Attorney General	New position

Place of Employment: (No abbreviations)	Dates Employed:
Wisconsin Supreme Court	February 2009-July 2010
Address:	Phone:
16 East State Capitol, Madison, WI	608-266-1884
Position Held:	Reason for Leaving:
Law Clerk/Senior Law Clerk	New position

Place of Employment: (No abbreviations)	Dates Employed:
Foley & Lardner LLP	Summer 2005; Sept. 2006-Feb. 2009
Address:	Phone:
777 East Wisconsin Ave., Milwaukee, WI	414-271-2400
Position Held:	Reason for Leaving:
Law Clerk; Associate	Not a good fit for me, and difficulty meeting hours requirements due to economic downturn, health issues, and other factors

Place of Employment: (No abbreviations)	Dates Employed:
Hewitt Associates	May 2000-August 2003
Address:	Phone:
4 Overlook Point, Lincolnshire, IL	847-295-5000
Position Held:	Reason for Leaving:
Participant Services Associate; Senior Participant Services Associate; Processing Analyst	Law School

Place of Employment: (No abbreviations)	Dates Employed:
Address:	Phone:
Position Held:	Reason for Leaving:

Place of Employment: (No abbreviations)	Dates Employed:

Address:	Phone:
Position Held:	Reason for Leaving:

BUSINESS OWNERSHIP / PARTNERSHIP LISTINGS

List all businesses or partnerships that you or your spouse or partner has been involved in:

Business or Partnership Name / City / State:	Was The Business Incorporated, obtain an LLC or other status :
Dates of Involvement:	Presently Listed as Corporate, Partnership or LLC Officer?

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Dates of Involvement:	Presently Listed as Corporate, Partnership or LLC Officer?

STATEMENT OF UNDERSTANDING AND AFFIRMATION

I hereby state that all of the information provided in this document is true and complete to the best of my knowledge and belief. I understand that any falsification or omission of information may disqualify me from consideration of any position. By signing this form, I authorize the Wisconsin Department of Justice, Division of Criminal Investigation, to conduct a background investigation and verify the information provided above.

[signature] 5/14/15

Signature of Person Under Consideration — Date

BLANKET AUTHORIZATION FOR RELEASE OF INFORMATION:

I hereby authorize the Wisconsin Department of Justice, Division of Criminal Investigation to obtain information and records pertaining to me from any or all of the following sources:

1. Present employer
2. Any previous employers
3. Any school, college, university or other educational institution
4. Credit bureaus
5. Banking or other financial institutions
6. Any place of business (for purposes of obtaining credit or employment data)
7. Military records centers
8. Any governmental agency or political subdivision
9. Wisconsin Department of Revenue

Exceptions to this blanket authorization:

1.

2.

3.

Brian Keith Hagedorn

Print Full Name of Person Under Consideration

B. K. Hagedorn

Signature of Person Under Consideration

7/14/15

Date

Elizabeth Hyzer

Witness and/or Notary Public

7/14/15

Date

Wisconsin Department of Justice
Division of Criminal Investigation
Background Investigation

Requesting Office: Office of the Governor

Type of Investigation: Limited Background

Applicant Name: Brian K. Hagedorn

Investigative Reporting Period: 07/16/2015 to 07/23/2015

This background investigation report is predicated upon the application and supporting materials provided by Brian K. Hagedorn who has applied for judicial appointment to the Wisconsin Court of Appeals. The findings documented in this report are based upon all available information at the time the information was provided and at the time the investigation was conducted.

07/23/2015
Date

Gary Martine, LTE Investigator

07-28-2015
Date

Jody R. Wornet, Director
Field Operations Bureau-Western, WI
Division of Criminal Investigation

SYNOPSIS

This is a report of a background investigation conducted on Brian K. Hagedorn who has applied for judicial appointment to the Wisconsin Court of Appeals (District II).

The applicant is currently the Chief Legal Counsel for the Office of the Governor.

The applicant is a 2006 law graduate of Northwestern University School of Law, Chicago.

The thirty-seven year old applicant resides in Madison.

REPORT OF INVESTIGATION

This background investigation is predicated upon the application and supporting materials provided by Brian K. Hagedorn who has applied for judicial appointment to District II of the Wisconsin Court of Appeals.

BIRTH RECORD

The applicant lists on his Background Disclosure Form (BDF) a date of birth of [redacted]1978. Public records and commercially available data used in an Accurint for Law Enforcement Report prepared on the applicant show the same date of birth as provided by applicant on his BDF.

EDUCATION

The applicant is a 1996 graduate of Wauwatosa West High School, Wauwatosa, Wisconsin.

In 2000 the applicant received a Bachelor of Arts degree in Philosophy from Trinity International University, Deerfield, Illinois. This information was previously verified through the National Student Clearinghouse.

In 2006 the applicant received his J.D. from Northwestern University School of Law, Chicago. This information was previously verified through the National Student Clearinghouse.

The applicant is currently a member in good standing with the Wisconsin State Bar. The applicant was issued license number #1061490 on 10/03/2006. There is no record of any past or pending disciplinary actions.

EMPLOYMENT

The applicant is currently the Chief Legal Counsel in the Office of Governor Scott Walker. The applicant has held this position since 01/2011.

From 2010 to 2011 the applicant was an Assistant Attorney General with the Wisconsin Department of Justice. This information was previously verified by Department of Justice HR Assistant Spelda Myrthil.

From 2006 to 2009 the applicant was an associate at the law firm of Foley & Lardner, LLP, Milwaukee. This information was previously verified by Foley & Lardner HR Associate Rachel Marsch.

DRIVER'S LICENSE CHECKS

Wisconsin Department of Transportation records show the applicant to hold a valid Wisconsin driver's license which expires on [redacted].

CRIMINAL RECORDS CHECKS

With the exception of three speeding citations dating back to 1994, the applicant states on his BDF he has never been convicted of any criminal violation and no charges are currently pending. NCIC and CIB record checks on the applicant were negative.

The applicant is referenced in a 2012 ACISS investigative report. The applicant was listed as the Chief Legal Counsel for Governor Scott Walker and was not the focus of the investigation.

CIVIL RECORDS CHECKS

A search of the Wisconsin Circuit Court Access Program (CCAP) website was conducted to locate public records in the name of the applicant. No records were located.

SOCIAL MEDIA RECORDS CHECKS

Checks of the applicant were conducted through the following social websites:

Facebook (www.facebook.com)	Positive
Pipl (www.pipl.com)	Positive
Spokeo (www.spokeo.com)	Positive
Google (www.google.com)	Positive
Twitter (www.twitter.com)	Possible
Linkedin (www.linkedin.com)	Positive

The applicant was located on several social media outlets. A cursory review located no information about the applicant that would reflect negatively on his character or integrity.

FINANCIAL RECORDS CHECKS

A review of the applicant's *TransUnion* credit summary was conducted. The report lists the applicant's current address as 11 Prentice Place, Madison. The report lists [redacted] The accounts that presently carry a balance due, type, maximum owed, present balances, and any payment delinquencies are as follows:

Account/Type	Most Owed	Present Balance Owed
[redacted]		

INCOME TAX RECORDS REVIEW

At the request of the Division of Criminal Investigation, the applicant provided his tax records

for the years 2012, 2013, and 2014. A review of these records provided the following information:

The applicant's 2012, 2013, and 2014 Wisconsin and federal tax returns were [redacted] filings. The applicant used the same name, Social Security number and address on the returns as provided by the applicant on his BDF. In each tax year, the applicant listed his occupation as an attorney. The applicant listed [redacted] dependents in 2012 and [redacted] dependents in 2013 and 2014.

2012

The applicant's 2012 federal tax return showed an adjusted gross income of $[redacted] All of this income was from the applicant's W-2 earnings of $[redacted] from the State of Wisconsin, Executive Office.

The applicant's Wisconsin tax return showed income of $[redacted] The income and deductions were consistent with the federal return.

2013

The applicant's 2013 federal tax return showed an adjusted gross income of $[redacted]. All of this income was from the applicant's W-2 earnings of $[redacted] from the State of Wisconsin, Executive Office.

The applicant's Wisconsin tax return showed income of $[redacted] The income and deductions were consistent with the federal return.

2014

The applicant's 2014 federal tax return showed an adjusted gross income of [redacted]. The majority of this income was from the applicant's W-2 earnings of $[redacted] from the State of Wisconsin, Executive Office.

The applicant's Wisconsin tax return showed income of $[redacted] The return included a $[redacted] subtraction for adoption expenses and a $[redacted] subtraction for private school tuition.

The applicant's returns were self prepared.

From:	Hizmi, Elizabeth - GOV
To:	Hagedorn, Brian K - GOV
Cc:	Ignatowski, Katie E - GOV; Rabe, David - GOV; Lowe, Diane - GAB; Harvell, Adam - GAB; wendy.minick@wicourts.gov; lori.irmen@wicourts.gov; Lamprech, Brian - COURTS; "lisa.neubauer@wicourts.gov"
Subject:	Appointment Letter
Date:	Tuesday, September 08, 2015 3:25:00 PM
Attachments:	Hagedorn_Appointment_090815.pdf

Dear Brian,

Congratulations on your appointment as Wisconsin Court of Appeals Judge, District Two. Attached, you will find your appointment letter. Please let me know if you have any questions or concerns.

All the best,

Elizabeth Hizmi / Director of Gubernatorial Appointments

Office of Governor Scott Walker / (608) 266-1212

elizabeth.hizmi@wisconsin.gov

SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. BOX 7863
MADISON, WI 53707

September 8, 2015

Mr. Brian Hagedorn
11 Prentice Place
Madison, Wisconsin 53704

Dear Mr. Hagedorn,

This letter is to confirm your appointment as Wisconsin Court of Appeals Judge, District Two, effective October 5, 2015. I would like to extend my congratulations. Your salary will be $139,059 annually.

I am confident that you will serve the citizens of District II well. In addition, your professional experiences should allow for an easy transition into the office.

I wish you the best as you transition into your new role.

Sincerely,

Scott Walker
Governor
State of Wisconsin

Cc: Honorable Lisa Neubauer, Court of Appeals Chief Judge
Brian Lamprech, Fiscal Officer of State Courts
Lori Irmen, Director of State Courts Office
Wendy Minick, Payroll Office
Adam Harvell, Wisconsin Government Accountability Board
Diane Lowe, Wisconsin Government Accountability Board